Supreme Court, U.S.
FILED

97 1113 DEC 19 1997

No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

GRANVILLE AMOS, *et al.*,
Petitioners,

v.

MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for a Writ of Certiorari

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QUESTION PRESENTED

Do § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act apply to state prisoners?

LIST OF PARTIES

The petitioners before this Court are Granville Amos, Harvey Bloxom, Michael Holt, Teddy Jones, Charles Madison, Howard Megginson, Boris Prymerman, Gary Ralph, Dennis B. Absher, John Smith, Jr., Michael Hilman Smith, William Lewis Smith, and Calvin J. Whiting. The respondents are the Maryland Department of Public Safety and Correctional Services, Roxbury Correctional Institution, Richard Lanham, Sr., Jon P. Galley, Ronald Moats, and William Smith.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 126 F.3d 589 (4th Cir. 1997). The opinions of the district court are unreported. They are set forth in the appendix at 1a - 12a. (hereinafter App.)

JURISDICTION

The decision of the Fourth Circuit was entered on September 22, 1997. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent text of the following statutes and regulations is set forth in the appendix to this petition at 13a - 40a:

Statutes
29 U.S.C.A. § 701 (West 1985 & Supp. 1997)
29 U.S.C.A. § 706 (West 1985 & Supp. 1997)
29 U.S.C.A. § 792 (West 1985 & Supp. 1997)
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42 U.S.C.A. § 12101 (West 1995)
42 U.S.C.A. § 12114 (West 1995)
42 U.S.C.A. §§ 12131-12134 (West 1995)
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41 C.F.R. pt. 101, subpt. 101-19.6, app. A (1997)
45 C.F.R. § 84.12 (1997)
45 Fed.Reg. 37,620-37,636 (1980) (codified at 28 C.F.R. §§ 42.501-40, app. A (1980))

STATEMENT OF THE CASE

A. Proceedings in the District Court

Petitioners are thirteen physically disabled individuals incarcerated at Roxbury Correctional Institution (hereinafter RCI) in Maryland. RCI is not handicap-accessible. Built in 1982, it was designated in 1984 as the only secure correctional facility in Maryland to house disabled prisoners. Petitioners filed suit in 1991 in federal district court against the Maryland Department of Public Safety and Correctional Services, RCI, Corrections Commissioner Richard Lanham, and RCI Warden John P. Galley, seeking injunctive relief and damages to remedy violations of § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C.A. § 794 *et seq.* (West Supp. 1997)) (hereinafter Rehabilitation Act).[1]

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[1]The Rehabilitation Act applies to any state governmental program or activity that receives Federal financial assistance:

The failure of the respondent state prison officials to make RCI handicap-accessible has taken a harsh toll on petitioners. Petitioners alleged[2] that, unlike non-disabled prisoners, their access to prison services, jobs and programs is severely restricted by the State's failure to make adjustments to the physical plant at RCI such as proper placement of grab-bars, sinks and toilets. The bathrooms in their cells[3] and the program areas at RCI lack proper grab-bars, causing the prisoners to fall when shifting from their wheelchairs to the toilets. Bathroom doorways are too narrow for their wheelchairs, causing the prisoners to defecate on themselves in the school, library, chapel, and recreation yard. The sinks in their cells are too high for wheelchair users, and the showers in the tier are barely handicap accessible, making it difficult, if not impossible, for the prisoners to keep themselves clean. The cell doorways are too narrow for wheelchairs, so the prisoners bruise their hands entering and exiting their cells. They can reach the medication dispensary and vocational shop only with great difficulty, if at all, because the ramp leading to them is too steep for wheelchairs. The prisoners are denied the opportunity to participate in the

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> United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

29 U.S.C.A. § 794(a).

[2]Petitioners' allegations were presented in their amended complaint, and in their summary judgment motions, which cited deposition testimony and declarations. The evidence of record was presented to the Fourth Circuit Court of Appeals in a joint appendix.

[3]Petitioners were assigned to Housing Unit 5 at RCI, which is not handicap-accessible. In 1989, respondents constructed a new housing unit at RCI, but did not make it handicap-accessible.

vast majority of jobs at RCI, and in work release and pre-release programs in or near their home communities.

The State brought a motion to dismiss the complaint, alleging that the Rehabilitation Act did not apply because RCI was not a recipient of federal funds. On June 26, 1991, the district court denied the motion to dismiss, ruling that RCI, as part of the operations of the defendant Department of Public Safety and Correctional Services, is a recipient of federal funds and engaged in a "program or activity," defined by the Rehabilitation Act to include "all of the operations of a department . . . of a State or of a local government." App. 9a.

The prisoners amended their complaint in 1992 to add claims under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C.A. §§ 12131-65 (West 1995) (hereinafter ADA), which took effect on January 26, 1992.[4]

On June 28, 1993, the prisoners filed a motion for partial summary judgment on the claims for injunctive relief. The State filed an opposition and a cross-motion for partial summary judgment on September 27, 1993. In July 1995, the

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[4]By its terms, the ADA applies to programs and services provided by "public entities" such as state governmental agencies. It provides:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

The amended complaint also added claims against prison officials acting in their official capacities, alleging inadequate medical treatment in violation of the Eighth and Fourteenth Amendments to the Constitution.

district court ordered the parties to submit memoranda regarding the effect on petitioners' case of the decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). In *Torcasio*, which held that prison officials sued in their official capacities under the ADA and Rehabilitation Act were entitled to qualified immunity (as it was not "clearly established" at the time of the alleged discrimination that the statutes applied to state prisons), the Fourth Circuit suggested in *dicta* that the statutes do not apply to prisoners.

The State filed a supplemental summary judgment motion on the damages claims on July 27, 1995, followed by a brief regarding the impact of *Torcasio.* The prisoners briefed the impact of *Torcasio* on September 12, 1995, and filed an opposition to the State's motion and a cross-motion for partial summary judgment on the statutory claims on September 22, 1995.

On January 26, 1996, the district court issued a memorandum decision granting the State's summary judgment motion on the statutory claims based on the *Torcasio dicta* and in the interest of "sound judicial management and prudent use of resources." [5] App. 4a.

B. Proceedings in the Court of Appeals

The prisoners appealed to the Fourth Circuit, joined by the United States Department of Justice (DOJ) as *amicus*

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[5]On May 30, 1996, the district court entered an order dismissing petitioners' constitutional medical claims and consolidating the above-entitled action with *Smith v. Lanham*, Civil No. JFM-95-524, for the purpose of appeal. App. 2a. The court filed an amended order on June 10, 1996, withdrawing its previous order and granting respondents' motion for summary judgment on the constitutional and statutory claims. App. 1a.

curiae. A divided three-judge panel of the Fourth Circuit upheld the district court's grant of summary judgment for respondents. In a decision by the Honorable Karen Williams, the majority concluded that the plain language of the ADA and Rehabilitation Act does not explicitly cover state prisons, and that absent a clear statement of congressional intent to apply the statutes to state prisons, federal intrusion into the states' domain of prison management is not warranted.[6] The Honorable Francis D. Murnaghan, Jr., dissented from the conclusion that the ADA and the Rehabilitation Act do not apply to state prisons in light of the unambiguous statutory language applying the acts to all operations of every state government agency, including the respondent Maryland Department of Public Safety and Correctional Services, and RCI, one of its "operations." *Amos v. Maryland Dep't of Public Safety & Correctional Servs.*, 126 F.3d 589, 613 (4th Cir. 1997) (Murnaghan, J., dissenting).

The majority stated that prison operations do not "fall naturally within the statutory terms 'services,' 'programs,' and 'activities'" provided by "public entities." 126 F.3d at 601. It reasoned that the ordinary meanings of the terms "eligible" and "participate" imply voluntariness, and thus exclude prisoners. *Id.* The court below relied exclusively upon two of the nine stated purposes underlying the statutes, "to assure equality of opportunity, full participation, independent living, and economic sufficiency for [disabled] individuals . . . [and] to pursue those opportunities for which our free society is

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[6]The Fourth Circuit also affirmed the dismissal of petitioners' constitutional claims regarding their medical care. Petitioners do not seek review of the Fourth Circuit's ruling on these claims.

justifiably famous."[7] Based on these selected purposes, the majority accordingly state prisoners from coverage "because of their inability to live in a free society" and enjoy the benefits of equal opportunity promoted by the statutes. *Id.* at 602. However, as noted by the dissent, the *Amos* majority failed to consider that Congress also enacted the ADA and the Rehabilitation Act to eliminate discrimination against disabled individuals based upon an explicit finding that "discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations . . . *institutionalization*, health services, voting and public services."[8]

The majority of the panel acknowledged that many regulations promulgated by DOJ under the Rehabilitation Act and the ADA specifically apply the acts to state prisons. 126 F.3d at 606. The court cited the Rehabilitation Act regulation that defines the word "program" to include the operations of a department of corrections,[9] an ADA regulation governing programs relating to law enforcement including "correctional institutions,"[10] and an ADA regulation that requires public entities to provide attendant care, "where the individual is an

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[7] *Id.* at 601-02 (citing 42 U.S.C.A. § 12101(a)(8) - (a)(9) (West 1995)); *see also id.* at 602 (citing the introductory section of the Rehabilitation Act, codified at 29 U.S.C.A. §701(a)(3) (West Supp. 1997), which provides for "full inclusion and integration [of disabled individuals] in the economic, political, social, cultural and education mainstream of American society")).

[8] *See* 42 U.S.C.A. § 12101(a)(3) (emphasis added); 29 U.S.C.A. § 701(a)(5); 126 F.3d at 615 (Murnaghan, J., dissenting).

[9] 126 F.3d at 606 (citing 28 C.F.R. § 42.540(h)).

[10] *Id.* (citing 28 C.F.R. § 35.190(b)(6)).

inmate of a custodial or correctional institution."[11] However, the majority refused to accord any deference to these regulations on the ground that "[t]he implications for the balance of power between the Federal Government and the States . . . are enormous" because of the "intrusiveness of [the] regulations." *Id.* at 606.[12]

In his dissent, Judge Murnaghan concluded that there is a clear statement in both the Rehabilitation Act and the ADA of Congress' intent to apply the acts to state prisoners.[13] Judge Murnaghan pointed out that the Rehabilitation Act defines "any program or activity" to include "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance."[14] Similarly, Judge Murnaghan pointed out that the ADA defines "public entity" as "any department, agency, special purpose district, or other instrumentality of a

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[11] *Id.* (citing 28 C.F.R. pt. 35, app. A, at 468).

[12] The court failed to substantiate its determination with any evidence from the lower court record revealing the "intrusive" nature of the DOJ regulations. Under the disability discrimination laws, respondents could justify their failure to provide the plaintiffs with access to the full range of jobs and vocational opportunities at RCI only by demonstrating that doing so would pose an undue hardship on the operations of the programs, or would fundamentally alter the nature of the programs. *See* 45 C.F.R. § 84.12(a)(1997); 28 C.F.R. § 35.130(b)(7)(1997). Respondents have failed to present any evidence to this effect.

[13] 126 F.3d at 616 (Murnaghan, J., dissenting) (citing 42 U.S.C.A. § 12101(b)(1); *Alexander v. Choate*, 469 U.S. 287, 295-97 (1985)).

[14] 126 F.3d at 614 (Murnaghan, J., dissenting) (citing 29 U.S.C.A. § 794(b)(1)(A)). It is undisputed that respondents were collectively the recipients of federal financial assistance. *See* 126 F.3d at 594 n.5.

State or States or local government."[15] Judge Murnaghan also disagreed with the majority's finding that the statutes were not intended to apply to prisoners because the statutory terms "eligibility and participation" necessarily imply voluntariness. Judge Murnaghan cited case law in which many compulsory activities (*e.g.*, jury service and public education) were held subject to the statutes. Accordingly, he concluded, prisoners are eligible for consideration as "qualified individuals" under the statutes. *Id.* at 615 (citations omitted).

The decision of the panel was entered on September 22, 1997. The petitioners did not seek rehearing.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

There is a clear conflict among the courts of appeal on the issue raised by this case. While the Third, Seventh and Ninth Circuits have held that the ADA and the Rehabilitation Act apply to state prisons, the Fourth and Tenth Circuits have held that the ADA and the Rehabilitation Act do not apply to state prisons.[16]

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[15] *Id.* at 614 (citing 42 U.S.C.A. § 12131(1)(B)).

[16] In reaching its conclusion, the *Amos* majority not only acknowledged the conflict in the circuits, but also invited this Court to resolve it:

> [W]e are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinarily circuitous statutory analyses which those courts reaching the contrary conclusion have undertaken and the considerable extra-interpretive energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise

The Third, Seventh and Ninth Circuits have explicitly rejected the Fourth Circuit's reasoning in *Amos* and *Torcasio*[17] that the statutory language is too broad to cover state prisons absent a clearer statement of congressional intent. These courts have held that the plain language of the statutes is unambiguous and applies to state prisons:

> We doubt . . . that Congress could speak much more clearly than it did when it made the [ADA] expressly applicable to all public entities and defined the term "public entity' to include every possible agency of state or local government.

Crawford v. Indiana Dep't of Corrections, 115 F.3d 481, 485 (7th Cir. 1997) (Posner, C.J.) (holding that the ADA and Rehabilitation Act apply to state prisons based upon the plain meaning of the statutory language, the ADA's explicit broad statement of purpose to eliminate discrimination, and Congress' incorporation into the ADA of the Rehabilitation Act's scope of coverage, and Congress' failure to create an

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> have followed on their holdings that these statutes apply to the Nation's myriad state prisons.

Id. at 591; *see also id.* at 600.

[17] *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996). The court below in *Amos* stated, "[a]fter painstakingly reexamining our opinion in *Torcasio*, we are convinced that *Torcasio*'s analysis of the issue is, indeed, compelling, and that the Rehabilitation Act and the ADA do not apply in the state prison context." 126 F.3d at 591, 600. The court further indicated that, "[b]ecause *Torcasio's* review of the language of the statutes, the relevant constitutional principles, and the manner in which our sister Circuits have addressed the issue was especially thorough, we begin our analysis with a full statement of what we decided in that case." *Id.* at 594. *See also id.* at 594-95, 601.

exception for state prisons); *Armstrong v. Wilson*, 124 F.3d 1019, 1023-24 (9th Cir. 1997) (holding that the plain language of the ADA and Rehabilitation Act applies to state prisons as "public entit[ies]" that provide "program[s] or activit[ies]"), *petition for cert. filed*, 66 U.S.L.W. 3308 (U.S. Oct. 20, 1997) (No. 97-686); *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170 (3d Cir. 1997) (holding that the plain, unambiguous language of the ADA and Rehabilitation Act covers state prisons as "public entit[ies]" that provide "activit[ies]," meaning "'natural or normal function[s] or operation[s] . . . of an organizational unit,'" and according deference to the DOJ implementing regulations which specifically apply the statutes to state prisons and were expressly authorized by Congress), *petition for cert. filed*, 66 U.S.L.W. 3298 (U.S. Oct. 8, 1997) (No. 97-634) (citation omitted). *See also Onishea v. Hopper*, 126 F.3d 1323, 1334 n.18 (11th Cir. 1997) (applying the Rehabilitation Act to state prisoners under law of the case doctrine, citing *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991)); *Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988) (holding that the Rehabilitation Act covers state prisoner, according to the plain statutory language and implementing regulations); *cf. Journey v. Vitek*, 685 F.2d 239 (8th Cir. 1982) (affirming prisoner's Rehabilitation Act claim where the defendants conceded that the statute applied to prisons).[18]

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[18]Many federal district courts have also held that the ADA and the Rehabilitation Act apply to state prisons. *See Randolph v. Rodgers*, No. 4:94 CV 991, 1997 WL 627038, at *7-*9 (E.D. Mo. Oct. 10, 1997); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505-11 (E.D. Mich. 1996); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1035-37 (S.D.N.Y. 1995); *Noland v. Wheatley*, 835 F. Supp. 476 (N.D. Ind. 1993); *Outlaw v. City of Dothan*, No. CV 92-A-1219-S, 1993 WL 735802, at *4 (M.D. Ala. Apr. 27, 1993); *Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976). *But see Pierce v. King*, 918 F. Supp. 932 (E.D.N.C. 1996) (holding that the ADA does not apply to state prisoner work assignments), *aff'd*, No. 96-7061, slip op. (4th Cir. Dec. 11, 1997); *Little v. Lycoming County*, 912 F. Supp. 809,

As further evidence of clear congressional intent, the Third and Seventh Circuits relied upon the regulations promulgated by the DOJ and authorized by Congress that specifically apply the statutes to state prisons. *Yeskey*, 118 F.3d at 171; *Crawford*, 115 F.3d at 484. The majority in *Amos* refused to defer to these regulations because the statutes implicated "the balance of power between the Federal Government and the states." 126 F.3d at 606. This reasoning was squarely rejected by the Third, Seventh and Ninth Circuits. *See Yeskey*, 118 F.3d at 173; *Crawford*, 115 F.3d at 485; *Armstrong*, 124 F.3d at 1024-25.

The Tenth Circuit has refused to apply the statutes to prisoner employment. *White v. Colorado*, 82 F.3d 364 (10th Cir. 1996); *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991). However, these Tenth Circuit decisions do not address the general issue of whether the statutes apply to state prisons. *See Armstrong*, 124 F.3d at 1025 (9th Cir. 1997) (distinguishing *White*); *but see Amos*, 126 F.3d at 597 (interpreting the *White* decision broadly to exclude from statutory coverage state prison programs or activities).

II. THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT

The decision of the court below is inconsistent with the reasoning in the decisions of this Court in *Bailey v. United States*, 116 S.Ct. 501, 506 (1995) and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984) and its progeny. The *Amos* decision also misapplies *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and *Will v.*

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820 (M.D. Pa.), *aff'd mem.*, 101 F.3d 691 (3d Cir. 1996) (granting state officials qualified immunity from liability under the ADA because statutory coverage of state prisons was not "clearly established" at the time of the alleged violation; suggesting that the ADA does not apply to state prisons).

Michigan Dep't of State Police, 491 U.S. 58 (1989).

A. The Court Below Erred in Refusing to Give Effect to the Clear Meaning of the Statutes as Written

The plain language of the Rehabilitation Act and the ADA covers state prisoners and thus does not allow for judicial creation of an unstated "prison exception" to coverage. The Rehabilitation Act applies to *any* state governmental program or activity that receives Federal financial assistance.[19] The Act defines the terms "program or activity" as "all of the operations of a . . . State or local government . . . any part of which is extended Federal financial assistance."[20] The plain language of Title II of the ADA also covers state prisoners.[21] The ADA applies to "services, programs, or activities of a public entity" irrespective of federal financial assistance. 42 U.S.C.A. § 12132. "Public entity" is defined in both statutes to include a "department, agency, special purpose district or

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[19]"No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C.A. § 794(a).

[20]29 U.S.C.A. § 794 (b)(1)(A).

[21]Title II of the ADA provides in pertinent part:

> [N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12132.

other instrumentality of a State or States or local government."[22]

The *Amos* majority conceded that the plain language of the statutes "when viewed in isolation, appears all-encompassing." 126 F.3d at 594. Nevertheless, noting that prisons are not explicitly mentioned in the statutes, the court refused to apply to prisons terms such as "services, programs or activities of a public entity." *Id.* at 595-96, 602. To do so, according to the *Amos* majority, would upset the traditional balance of power between the federal government and the states. *Id.*

The decision of the Fourth Circuit is inconsistent with the principle stated in *Bailey v. United States*, 116 S. Ct. 501, 506 (1995), that when Congress uses unambiguous terms, there is no occasion for judicial inquiry beyond the words of the statute. In *Bailey*, the Court ruled that the plain meaning of the term "use" connotes action, and reversed the convictions of two defendants under the federal criminal code for insufficient evidence they "used" firearms during a drug trafficking offense. *Id.* at 509. *See also Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished.")

The *Amos* majority acknowledged that the breadth of the statutory language covering "any program or activity"[23] of

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[22] 42 U.S.C.A. § 12131(1)(B); 29 U.S.C.A. § 794(b)(1)(A).

[23] The majority disregarded that the word "any," which modifies "program or activity" in the Rehabilitation Act means without limitation. *See, e.g., Shea v. Vialpando*, 416 U.S. 251, 260 (1974) (holding that the

a "public entity" is "all encompassing" and that the statutes explicitly subject the states to liability. 126 F.3d at 594. But it disregarded this "all encompassing" language, and finding no explicit mention of prisons in the statutes, *id.* at 596, it concluded that "Congress did not contemplate, let alone approve, the pre-ADA application of the Rehabilitation Act to state prisons." *Id.* at 603. This is demonstrably incorrect.

In the Rehabilitation Act, Congress directed the Attorney General and all agency heads to promulgate regulations to carry out the statute and to submit "[c]opies of any proposed regulations . . . to appropriate authorizing committees of the Congress." 29 U.S.C.A. § 794(a).[24] In accordance with this congressional mandate, the DOJ promulgated regulations, many of which specifically apply the statute to state prisons. Subsequently, Congress expressly incorporated the regulations into the ADA.[25] In 1990, when

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plain meaning of the term "any" in Social Security Act means that no limitation, apart from reasonableness, may be used to calculate allowance for AFDC beneficiaries); *Hutto v. Finney*, 437 U.S. 678, 694 (1978) (stating that the Civil Rights Attorney's Fees Award Act applies to "any" action brought to enforce 42 U.S.C.A. § 1983, and allows the prevailing party to recover attorney fees and costs).

[24]This approval process suggests that Congress was aware of the regulations promulgated under the Rehabilitation Act that apply the statute to state prisons. *See infra* Point II.C.

[25]Section 12201(a) provides:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C.A. § 790 *et seq.*) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C.A. § 12201(a) (West 1995). Congress not only incorporated the

Congress enacted the provision of the ADA incorporating the existing DOJ regulations that explicitly applies the Rehabilitation Act to state prisons, those regulations had been on the books *for ten years*.[26]

The *Amos* majority ignored this congressional mandate and pointed to "[c]ongressional silence in the ADA's legislative history regarding the applicability of the statute to state prisons." 126 F.3d at 602. However, since the regulations specifically apply the statutes to state prisons and Congress subsequently incorporated these regulations in the ADA, the court's reliance on "congressional silence" is misplaced.[27]

The court found that the statutory language "does not even hint at an intention by Congress to make the ADA applicable to state prisons. Indeed, the contrary inference . . . [should be] drawn." 126 F.3d at 602. The court concluded that prisoners cannot be "qualified" to participate in programs or services covered by the statute, because the statutory terms "eligible" and "participate" imply voluntary participation. 126

Rehabilitation Act regulations into the ADA, but also "any requirements of those regulations . . . such as program access that go beyond Titles I and III." H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366-67. Congress also incorporated into the ADA "[t]he remedies, procedures, and rights set forth in section 794a of Title 29 [the Rehabilitation Act] . . . to any person alleging discrimination on the basis of disability in violation of Section 12132." 42 U.S.C.A. § 12133 (West 1995).

[26]*See, e.g.*, 45 Fed. Reg. 37,620, 37,630 (1980) (codified at 28 C.F.R. Part 42(G) (1980)).

[27]In fact, the legislative history of the ADA cites the need to train jail personnel about non-discriminatory treatment of disabled arrestees in order to assure their compliance with the statute. *See* H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 473.

F.3d at 596, 601. In fact, Congress made clear that it intended the ADA to apply even in involuntary contexts. The statutory findings state that "discrimination against individuals with disabilities persists in such critical areas as . . . institutionalization."[28] But the *Amos* majority ignored this finding and focused exclusively on the provision that promoted mainstreaming disabled individuals into society. 126 F.3d at 601-02.

B. The Court Below Misapplied the "Clear Statement Rule" *of Will v. Michigan Dep't of State Police* and *Gregory v. Ashcroft*

Citing *Will v. Michigan Dept of State Police*, 491 U.S. 58, 65 (1989) and *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991), the *Amos* majority disregarded the plain statutory language evincing Congress' intent and reasoned that the "clear statement rule" of statutory construction precludes a finding that the ADA and Rehabilitation Act apply to state prisoners:

> If Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute. . . . In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."

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[28] 42 U.S.C.A. § 12101(a)(3); 29 U.S.C.A. § 701(a)(3).

Amos, 126 F.3d at 595 (quoting *Will*, 491 U.S. at 65) (internal citations omitted); *id.* at 604.

The *Amos* majority also relied on *Gregory v. Ashcroft* for its clear statement rule analysis. 126 F.3d at 604-05. It reasoned that "management of state prisons is a core state function" in which federal courts must not intrude, absent express statutory language applying the statutes to state prisons. *Id.* at 595. Because the statutes do not expressly state that they cover state prisoners, the court concluded that federal intrusion into state prison management is not warranted. *Id.* at 602.

The Fourth Circuit misapplied *Gregory* and *Will*. Courts are to resort to the "clear statement rule" *only* where statutory language is ambiguous, *Gregory*, 501 U.S. at 470,[29] *and* the proposed application of federal law would infringe upon a core function going to the "heart of representative government," *e.g.*, "the authority of the people of the States to determine the qualifications of their most important government officials." *Id.* at 463.

In *Gregory*, this Court held that the Age Discrimination in Employment Act of 1967 (ADEA) did not preempt a Missouri constitutional provision mandating retirement for state judges at age 70. *Id.* at 473. The case turned on whether state judges were "appointee[s] on the policymaking level" within the terms of the ADEA, and thus exempt from the statute. *Id.* at 465. Finding the statutory text ambiguous, the

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[29] *See also Salinas v. United States*, No. 96-738, 1997 WL 737692, at *6 (U.S. Dec. 2, 1997) (affirming a bribery conviction and refusing to apply the clear statement rule where the plain unambiguous language of the federal penal statute did not require proof that a bribe involved federal funds and the "statute can be unambiguous without addressing every interpretive theory offered by a party").

Court declined to resolve the ambiguity in favor of coverage of state judges. To do so would preempt the state constitutional provision, and "[t]his provision goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity." *Id.* at 460.

It was error for the *Amos* court to invoke the "clear statement rule" because neither part of the two-part standard applies. The statutory language is not ambiguous, and the application of the statutes would not infringe a core function going to the "heart of representative government."

Congress has clearly stated that the non-discrimination mandate of the statutes applies to *all* operations of state and local governments. What is more, Congress has authorized regulations pursuant to the Rehabilitation Act that specifically apply the statute to state prisons, and then *has actually incorporated these regulations into the ADA.*[30] *See infra* Point II.C.

The court below concluded that the statutes are ambiguous and thus that the "clear statement rule" should be invoked because "prisons are not expressly mentioned in the statute[s]." 126 F.3d 596, 604.[31] But in *Gregory*, the Court

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[30] 29 U.S.C.A. § 794(a); 42 U.S.C.A. § 12201.

[31] The court below stated, "a clear statement is required . . . whether the statute applies in the particular manner claimed," 126 F.3d at 604, and found that "[t]he applicability of the statutes to state prisons and prisoners . . . was simply not addressed by Congress in the language of the statutes." *Id.* at 605. The *Amos* majority failed to take into account the legislative history of the ADA which reflects Congress' intention "not to list [in Title II] all the types of discrimination that are included within the term 'discrimination' as was done in Titles I and III, because this title [Title II] essentially simply extends the anti-discrimination prohibition embodied in Section 504 to all actions of state and local governments." H.R. Rep. No.

rejected the notion that Congress must specify each governmental entity or category of agencies to be covered by a statute. 501 U.S. at 467 ("This does not mean that the [ADEA] must mention judges explicitly. . . . Rather, it must be plain to anyone reading the Act that it covers judges.")[32]

In *Gregory*, there was a genuine ambiguity in the ADEA provision regarding the scope of coverage; at issue was a statutory provision creating an *exception* to coverage, an exception that was at once broad and vague.[33] Since the federal statute was in derogation of the State's constitution, it was appropriate to resolve the ambiguity *against* coverage. Here, in contrast, Congress has used unambiguous terms to provide for broad coverage of "any program or activity," defined to include all state government operations; and Congress has also specified a number of categories as narrow exceptions to the rule of coverage, without excluding prisoners from coverage.[34] Thus, the situation is the reverse of that in

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485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 366.

[32] The *Amos* majority disclaimed its adherence to this discredited approach to statutory construction but in fact that is the gist of its reasoning. 126 F.3d at 605 n.10; *id.* at 614 (Murnaghan, J., dissenting).

[33] *See* 501 U.S. at 467.

[34] Congress did specify a number of categories of individuals not covered by the ADA. It drafted explicit narrow statutory exceptions to ADA coverage but did not exclude prisoners. *See, e.g.*, 42 U.S.C.A. § 12211 (excluding transsexuals, compulsive gamblers, kleptomaniacs and pyromaniacs); 42 U.S.C.A. §§12114, 12210 (excluding from ADA coverage current illegal drug users); *see also* 29 U.S.C.A. § 706(8)(C)(i) (excluding from Rehabilitation Act coverage current illegal drug users). By specifically excluding certain groups from statutory coverage and not mentioning prisoners among them, Congress expressed its intention to cover prisoners under the statutes. It is a basic rule of statutory construction that where, as here, exceptions to a statute's sweeping language are narrowly drawn,

Gregory.

The *Amos* majority also erred in invoking the clear statement rule because, unlike the state judicial qualifications at issue in *Gregory*, state prison management is not a core function "going to the heart of representative government:"

> Maybe there is an inner core of sovereign functions, such as the balance of power between governor and state legislature, that if somehow imperiled by the ADA would be protected by the clear-statement rule, . . . but the mere provision of public services, such as schools and prisons, is not within that inner core.

Crawford, 115 F.3d at 485 (Posner, C.J.).[35] *See also Foster v. Love*, 66 U.S.L.W. 4015, 4016 (U.S. Dec. 2, 1997) (holding that invocations of state sovereignty are insufficient to override a state's obligation to follow applicable federal

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the exceptions are limited to those actually listed.

[35]The *Amos* majority's premise that the clear statement rule should be invoked based on the court's view of state prison management as a "core state function" is also erroneous. This Court has:

> reject[ed] as unsound in principle and unworkable in practice, a rule of state immunity from federal regulation that turns on a judicial appraisal of whether a particular governmental function is 'integral' or 'traditional.' Any such rule leads to inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.

Garcia v. Metro. Transit Auth., 469 U.S. 528, 546-47 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

statutes setting a uniform federal election day, and invalidating a state statutory provision for congressional elections based on open primaries).

In *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725 (1995), this Court rejected the notion that the clear statement rule applies to anti-discrimination laws. The Court relied instead on another canon of statutory interpretation, mandating that civil rights legislation be read expansively. *Id.* at 732, 737 n.11. Congress has clearly expressed its intent to apply the non-discrimination mandate of the ADA and Rehabilitation Act to all operations of state and local governments, including state prisons. The court below was thus not free to disregard the statutory language and to create an exception for prisoners by invoking the clear statement rule.

C. The Court Below Erred in Failing to Defer to the DOJ's Rehabilitation Act Regulations Because Congress Explicitly Authorized The Regulations and Subsequently Incorporated Them into the ADA

Having found the statutes ambiguous, the court below erred by disregarding the DOJ regulations that resolve any possible doubt that Congress intended to apply the statutes to state prisoners. 126 F.3d at 606. These regulations command substantial deference because they were promulgated by the agency entrusted to enforce the Rehabilitation Act and authorized by Congress in 1980. 29 U.S.C.A. § 794(a); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, the regulations in this case are conclusive evidence of congressional intent, because Congress explicitly adopted these regulations in the ADA, making them part of the statute that state and local

governments must obey. 42 U.S.C.A. § 12201.

Congress was undoubtedly aware in 1990 when it enacted the ADA of the 1980 DOJ regulations which it had authorized under 29 U.S.C.A. § 794(a), expressly applying the Rehabilitation Act to state prisons. Had the decade-old DOJ interpretation been in conflict with congressional intent, Congress presumably would have specifically exempted state prisons from coverage.[36] Congress, however, did precisely the opposite. It incorporated these regulations into the ADA,[37] expressly applying the statute to state prisons and prisoners. Accordingly, the states are bound under the Supremacy Clause by the DOJ regulations, which are embodied in the ADA. *Chevron* deference does not even come into play. The *Amos* majority's refusal to apply the statute to state prisoners is a refusal to apply the statute as Congress wrote it.

Chevron deference is relevant, however, when construing the Rehabilitation Act which requires the Attorney General to promulgate regulations to implement and enforce the statute and then to submit the proposed regulations to a congressional committee for approval. *See* 29 U.S.C.A. § 794(a). Many of these regulations specifically apply the statute to state prisons.[38] Because the DOJ's interpretation of

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[36]*See supra* note 34.

[37]42 U.S.C.A. § 12201(a); H.R. Rep. No. 485, Part II, *reprinted in* 1990 U.S.C.C.A.N. 267, 366, 473.

[38]*See, e.g.*, 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2) (1980); 28 C.F.R. § 42.540(h) (1980); 28 C.F.R. § 42.540(j) (1980); 45 Fed. Reg. 37,620, 37,630 (1980). Likewise, DOJ regulations first promulgated in 1991 under the ADA make it explicit that the statute applies to state prisons. Congress "designate[d] the [DOJ] as the agency responsible for coordinating the compliance activities of public entities that administer 'programs, services, and regulatory activities relating to law enforcement, public safety, and the

the statute is longstanding and reasonable, the court below was not at liberty to reject the agency's interpretation in favor of its own, under the principle stated in *Chevron*.

The very preamble to the DOJ regulations promulgated in 1980 under the Rehabilitation Act explicitly requires that "a sufficient number of detention cells need be accessible to wheelchair users" in detention and correctional facilities.[39] These regulations further require that:

> [f]acilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. . . . In making housing

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administration of justice, *including courts and correctional institutions*.'" 42 U.S.C.A. § 12134 (emphasis added). Moreover, the regulations are accompanied by a detailed interpretive analysis which makes it explicit that they apply to state prisoners:

> A public entity is not . . . required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

28 C.F.R. pt. 35, app. A at 21-22 (1997). This Court accords the same deference to the DOJ interpretive analysis as to the regulations themselves. *See Alexander v. Choate*, 469 U.S. 287, 305 n.26 (1985).

[39] 28 C.F.R. pt. 42(G), app. B, subpt. (c)(2)(1980); 45 Fed. Reg. 37,620, 37,630 (1980).

> and program assignments, such [correctional] officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmates.

45 Fed. Reg. 37,630 (1980).

The DOJ implementing regulations explicitly define the word "program" to include the operations of a department of corrections, and explicitly define the word "benefit" to include disposition, sentencing and confinement.[40] Moreover, regulations promulgated under Section 502 of the Rehabilitation Act[41] adopt the Uniform Federal Accessibility Standards [UFAS] accessibility guidelines, which include provisions specifically covering state jails and prisons. The DOJ adopted and incorporated UFAS into the regulations on March 7, 1988.[42]

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[40]28 C.F.R. § 42.540(h) (1980).

[41] Section 502 of the Rehabilitation Act established an Architectural and Transportation Barriers Compliance Board. Congress mandated the Board to "ensure compliance with the standards prescribed pursuant to the . . . Architectural Barriers Act of 1968, [42 U.S.C.A. §§ 4151 - 57], and "to establish . . . minimum guidelines and requirements for the standards issued pursuant to the [Architectural Barriers Act]." 29 U.S.C.A. § 792(b) (West Supp. 1997).

[42]*See* 28 C.F.R. § 42.522(b) (1988). DOJ appended to the regulations promulgated under Title II of the ADA the UFAS requirements which specifically mention jails, prisons, and "other detention or correctional

When, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. The intent of Congress to apply the statutes to state prisons could not be clearer because Congress adopted the Rehabilitation Act regulations in the ADA. 42 U.S.C.A. §12201.

Even if Congress had not explicitly adopted in the ADA the regulations applying the statute to prison, the conclusion is unavoidable under the rule in *Chevron* that the statute applies to prisoners. In *Chevron,* this Court stated, courts must not disregard regulations unless they are "arbitrary, capricious, or manifestly contrary to the statute. . . . considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." 467 U.S. at 844 (citations omitted). *See also Smiley v. Citibank (S. D.), N.A.*, 116 S. Ct. 1730, 1733 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in

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facilities." The standards expressly apply to "institutional occupancies where the occupants are under some degree of restraint or restrictions for security reasons." *See* 41 C.F.R. pt. 101, subpt. 101-19.6, app. A, § 4.1.4(9)(c) (1997). Agencies may comply with either UFAS or ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA. 36 C.F.R. § 1191.2 (1997); 28 C.F.R. § 35.151(c) (1997). Both sets of standards refer explicitly to prisons, jails and detention facilities. Contrary to the *Amos* majority's contention that the regulations intrude upon state prison management, 126 F.3d at 606, the regulations do *not* require that every facility must be handicap-accessible; rather, they provide that the system *viewed in its entirety* must be accessible. *See* 45 Fed.Reg. 37,620, 37,630 (1980). In addition, DOJ regulations codified at 28 C.F.R. § 35.151(c) give agencies the choice of following UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG) in meeting their obligations under the ADA. Indeed, prison officials need not follow *either* set of guidelines, as long as they provide equivalent access. *Id.*

statutes that they are charged with administering.")

This Court has repeatedly applied the *Chevron* rule in interpreting the disability discrimination statutes, stressing that the regulations implementing the Rehabilitation Act, because they were promulgated with the oversight and approval of Congress, are an important source of guidance on the meaning of the Rehabilitation Act and merit substantial deference. *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634-35 (1984); *Alexander v. Choate*, 469 U.S. 287, 304 n.24 (1985); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 279 (1987). These longstanding regulations provide strong evidence that it was Congress' intention to apply the statutes to state prisoners.[43] They effectuate the broad remedial purpose of the statutes to eliminate discrimination; they are entirely consistent with the plain meaning of the statutory language (and indeed, they have been incorporated by Congress into the ADA); and they impose no obligations on state prisons beyond those mandated by the statutes' broad nondiscrimination mandate.

The Fourth Circuit rejected the DOJ's longstanding, reasonable statutory interpretation. Citing "enormous" (but unspecified) implications for the balance of power between the federal and state governments, the majority in *Amos* stated, "we will not defer to an administrative agency's interpretation

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[43]"These regulations were expressly authorized by Congress . . . and, in view of Congress' delegation, the DOJ's regulations should be accorded 'controlling weight unless [they are] arbitrary, capricious, or manifestly contrary to the statute.'" *Yeskey*, 118 F.3d at 171 (citing *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995)) (internal citations omitted).

of the statute, however reasonable." 126 F.3d at 607.[44] But there is no "prison exception" to the principle that courts must give effect to the unambiguously expressed intent of Congress. The *Amos* majority's refusal to give effect to the statutory provision expressly incorporating the regulations in the ADA is in effect an insupportable judicial repeal of the statute.

CONCLUSION

For the above reasons, petitioners request that the Court grant this petition for a writ of certiorari and review the Fourth Circuit's determination that the Rehabilitation Act and the ADA do not apply to state prisoners.

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[44]In the absence of any precedential support for their rejection of the *Chevron* doctrine, the *Amos* majority cited the dissenting opinion in *Gregory*. *Id.* at 607 (citing *Gregory*, 501 U.S. at 493 (Blackmun, J., dissenting), for the proposition that this Court "soundly rejected" *Chevron* deference in favor of the "clear statement rule").

Respectfully submitted,

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December 19, 1997

APPENDIX TO PETITION FOR CERTIORARI

Opinions Below

AMENDED ORDER (June 10, 1996) 1a

ORDER (May 30, 1996) 2a

MEMORANDUM (January 26, 1996) 4a

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STATUTORY AND REGULATORY PROVISIONS INVOLVED

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29 U.S.C.A. § 701 (West 1985 & Supp. 1997) 13a

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29 U.S.C.A. § 792 (West 1985 & Supp. 1997) 15a

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28 C.F.R. pt. 35 app. A (1997) 22a

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28 C.F.R. § 35.190 (1997) 24a

28 C.F.R. § 39.150 (1997) 25a

36 C.F.R. § 1191.2 (1997) 27a

41 C.F.R. pt. 101, subpt. 101-19.6, app. A (1997) 33a

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45 Fed. Reg. 37620 - 37636 (1980)
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES

AMENDED ORDER

It is, this 10th day of June, 1996,

ORDERED:

1. That the order dated May 30, 1996, is hereby withdrawn;

2. That defendants' motion for summary judgment as to all claims asserted by plaintiffs is granted; and

3. That judgment be entered in favor of defendant against plaintiffs.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES
et al.

WILLIAM LEWIS SMITH

v. CIVIL NO. JFM-95-524

RICHARD LANHAM, et al.

ORDER

It is, this 30th day of May, 1996,

ORDERED:

1. These actions are consolidated;

2. In accordance with the memorandum and order that I entered herein on January 26, 1996, the motion for summary judgment filed by defendants in Civil No. JFM-91-508 as to all claims asserted by plaintiffs under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990 is granted, and judgment is entered in favor of defendants against plaintiffs as to those claims; and

3. In accordance with the colloquy between the court and counsel at the hearing held in Civil No. JFM-95-524 on May 1, 1996, and upon the representation of counsel that during that colloquy counsel for plaintiffs was speaking on behalf of plaintiffs in Civil No. JFM-91-508 as well, all claims asserted by plaintiffs in both cases under the Eighth Amendment of the United States Constitution are voluntarily dismissed without prejudice.

/s/
J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(410) 962-2600

January 26, 1996

MEMO TO COUNSEL RE: Amos v. MD Department of Public Safety Civil No. JFM-91-508
Smith v. Lanham
Civil No. JFM-95-524

Dear Counsel:

I have reviewed the extensive memoranda that have been filed in connection with the various summary judgment motions that have been filed in these cases.

Defendants' motion will be granted as to all of the claims asserted by plaintiffs in Civil No. 91-508 under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990. In Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995) a three-judge panel of the Fourth Circuit strongly stated its view that those Acts do not apply to state prisons. I recognize that what the Court said in this regard is dictum and that plaintiffs believe the dictum is wrong. I also recognize that before Torcasio was decided I had ruled, based upon the then existing precedents, that State prisons are covered by the Rehabilitation Act and the ADA.

There are certainly some circumstances under which I would decline to follow mere dictum from the Fourth Circuit if I were of the view that the dictum was incorrect. Here, however, I am persuaded that considerations of sound judicial management and prudent use of resources dictate that I follow the Torcasio dictum. Were I not to do so and if the Fourth Circuit ultimately were to adhere to what it said in Torcasio, endless hours would be spent and wasted in litigating the myriad of issues (including ones relating to attorneys' fees) under the two statutes. If, on the other hand, the Fourth Circuit concludes on appeal in this case that the Torcasio dictum was incorrect, the case will simply be remanded for further proceedings.[1]

As to plaintiffs' claims for monetary damages for alleged constitutional violations relating to the medical care that they received (or, more accurately, did not receive), I will hold a hearing on the pending motions at 10:00 a.m. on Friday, February 9, 1996, in Courtroom 5A. Based upon my review of the memoranda, my tentative view is that the State defendants are entitled to summary judgment to the extent that plaintiffs' claims relate to the insufficiency of the medical treatment that they received even if the State defendants were put on notice of plaintiffs' claims in that regard by ARPs. I have questions regarding plaintiffs' claim that the State defendants failed to follow up on medical treatment that had been ordered. I ask you to be prepared to focus upon those subjects during the hearing.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

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[1]Presumably, the court will at least adhere to the Torcasio holding relating to the issue of qualified immunity, thereby removing any monetary damage claims under the two Acts.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

cc: Court File

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. CIVIL NO. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES

ORDER

For the reasons stated in this memorandum to counsel being entered herewith, it is, this 26th day of January, 1996,

ORDERED that defendants' motion for summary judgment is granted as to all claims asserted by plaintiffs under § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act of 1990.

/s/
J. Frederick Motz
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

GRANVILLE AMOS, et al.

v. Civil No. JFM-91-508

THE MARYLAND DEPARTMENT
OF PUBLIC SAFETY AND
CORRECTIONAL SERVICES,
et al.

MEMORANDUM

Plaintiffs are disabled inmates of the Roxbury Correctional Institution ("RCI"), located near Hagerstown, Maryland. They allege that they have been denied access to services, programs, facilities, and benefits provided to non-disabled RCI inmates. They seek relief under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.

Defendants have moved to dismiss on the grounds that the plaintiffs have not alleged discrimination in any "program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).[1] Their motion will be denied.

Section 504 of the Rehabilitation Act of 1973 prohibits officials of any "program or activity receiving Federal financial

[1] They also make the ancillary contention that the § 1983 claim should be dismissed because it can serve only as a vehicle to enforce the § 504 claim. I need not reach this issue because I uphold the § 504 claim.

assistance" from discriminating against otherwise qualified individuals with handicaps. 29 U.S.C. § 794(a). The question presented here is whether the plaintiffs, by virtue of their incarceration at RCI, take part in any "program or activity receiving Federal financial assistance."

29 U.S.C. § 794(b)(1)(A) defines "program or activity" as "all of the operations of a department, agency, special purpose district, or other instrumentality of a State or of a local government." Legislative history of § 794(b) reveals that Congress intended to establish a broad definition of "program or activity." The Senate Report accompanying § 794(b) expressed Congress's intention to "restore . . . the broad, institution-wide application which characterized coverage and enforcement from the time of initial passage until the [Grove City College v. Bell, 465 U.S. 555 (1984)] decision." S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 5.

This case turns on RCI's status within the Maryland prison system. According to the defendants, RCI is a component of the Maryland Division of Corrections, which in turn is part of the Maryland Department of Public Safety and Correctional Services ("DPSCS"). The defendants do not deny that DPSCS receives federal funding.[2] From the plain language of § 794(b)(1)(A), RCI is therefore subject to § 504 of the Rehabilitation Act. DPSCS is a "department . . . of a State" which presumably receives federal financial assistance, and RCI is part of the "operations" of DPSCS. Accord Bonner v. Arizona Dep't of Corrections, 714 F. Supp. 420 (D. Ariz. 1989) (because

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[2] In addition, it is uncontroverted that the Division of Corrections receives federal funds, although the defendants characterize these funds as being "extremely limited." The warden of RCI has submitted an affidavit stating that RCI receives no federal financial assistance.

Department of Corrections received federal funding, § 504 of Rehabilitation Act applied to "all of the operations of the Department . . . regardless of which specific program receives federal funds").

Legislative history supports this conclusion. The Senate report quoted above provides the following analysis of § 794(b)(1)(A):

> The bill provides that when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered . . . . Examples: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations. S. Rep. No. 64, 100th Cong., 2d Sess. 16, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 18.

This example is directly analogous to the instant case. Here, federal funding has been provided to the DPSCS. Therefore, "the entire . . . department would be covered in all of its operations."

The defendants make two arguments to the contrary. First, they contend that RCI is not part of the "operations" of DPSCS. Pointing out that RCI has its own budget and that RCI's warden is vested with certain authority to run the institution, the defendants argue that RCI is autonomous within the Maryland prison system. See Md. Ann. Code art. 27, § 682(b). This argument is unpersuasive. Although the warden of RCI may well possess control over many aspects of RCI's operations, by the defendants' own admission RCI is part of the Division of Corrections, which is in turn part of the DPSCS. Therefore, to

argue that RCI is not part of the "operations" of DPSCS is to defy the administrative structure of the Maryland prison system as the defendants themselves have described it.

Second, the defendants cite legislative history for the proposition that Congress intended to establish "institution-wide" coverage for § 504 of the Rehabilitation Act. See, e.g., S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 6. They argue that since RCI is an "institution," and does not receive federal funds, it therefore is not covered by § 504. While possessing a superficial plausibility, this argument founders on the plain language of 29 U.S.C. § 792(b)(1)(A). It also ignores the context in which § 792(b) was enacted.

Congress adopted § 792(b) as the Civil Rights Restoration Act of 1987, Pub. Law No. 110-259, 102 Stat. 28 (1988). The stated objective of the Act was to overturn the Supreme Court decision of Grove City College v. Bell, 465 U.S. 555 (1984). See, e.g., S. Rep. No. 64, 100th Cong., 2d Sess. 2, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 4. In Grove City a private college enrolled some students who received federal financial aid but otherwise declined to accept federal funds. The Supreme Court rejected the contention that these facts "trigger[ed] institutionwide coverage" under a non-discrimination statute similar to § 504. 465 U.S. at 573. Instead, the Court held that only the college's financial aid office was subject to the dictates of the non-discrimination statute. Id. at 574.

With this background, it is apparent that Congressional references to "institution-wide" coverage in the legislative history of the Civil Rights Restoration Act merely indicate specific rejection of Grove City. The "institution-wide" language has little relevance to a case, such as this one, brought against a

department of state government. See S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S. Code Cong. & Admin. News 3, 6. (stating that the bill will "make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance") (emphasis added).

For these reasons, defendants' motion to dismiss is denied. A separate order effecting the ruling made herein is being entered herewith.

Date: June 26, 1991

/s/
J. Frederick Motz
United States District Judge.

29 U.S.C.A. § 701 (West 1985 & Supp. 1997). Findings; purpose; policy

(a) Findings

Congress finds that —

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

* * *

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to —

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

29 U.S.C.A. § 706 (West 1985 & Supp. 1997). Definitions

For the purposes of this chapter:

* * *

(8)(C)(i) For purposes of subchapter V of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when a covered entity acts on the basis of such use.

(ii) Nothing in clause (i) shall be construed to exclude as an individual with a disability an individual who —

(I) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

(II) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(III) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subclause (I) or (II) is no longer engaging in the illegal use of drugs.

(iii) Notwithstanding clause (i), for purposes of programs and activities providing health services and services provided under subchapters I, II and III of this chapter, an individual shall not be excluded from the benefits of such programs or activities on the basis of his or her current illegal use of drugs if he or she is otherwise entitled to such services.

29 U.S.C.A. § 792 (West 1985 & Supp. 1997). Architectural and Transportation Barriers Compliance Board

* * *

(b) Functions

It shall be the function of the Access Board to —

> (1) ensure compliance with the standards prescribed pursuant to the Act entitled "An Act to ensure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968 (commonly known as the Architectural Barriers Act of 1968; (42 U.S.C. 4151 et seq.) . . . including enforcing all standards under such Act, and ensuring that all waivers and modifications to the standards are based on findings of fact and are not inconsistent with the provisions of this section;
>
> * * *
>
> (3) establish and maintain minimum guidelines and requirements for the standards issued pursuant to the Act commonly known as the Architectural Barriers Act of 1968 [42 U.S.C.A. § 4151 et seq.] and titles II and III of the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12131 et seq. and § 12181 et seq.];
>
> (4) promote accessibility throughout all segments of society[.]
>
> * * *

29 U.S.C.A. § 794(a), (b) (West Supp. 1997).

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency. . . . The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined

For the purposes of this section, the term "program or activity" means all of the operations of —

> (1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which assistance is extended, in the case of assistance to a State or local government;

* * *

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

42 U.S.C.A. § 12101 (West 1995) (1990)

(a) Findings

The Congress finds that —
(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;
(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals continue to be a serious and pervasive social problem;
(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;
(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

* * *

(b) Purpose

It is the purpose of this chapter —
(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

42 U.S.C.A. § 12114 (West 1995). Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of this subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

* * *

42 U.S.C.A. § 12131(1), (2)

As used in this subchapter:

(1) Public entity
The term "public entity" means —
(A) any State or local government;

(B) any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]

* * *

(2) Qualified individual with a disability

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12132 (West 1995). Discrimination

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C.A. § 12133 (West 1995). Enforcement

The remedies, procedures, and rights set forth in section 794a of Title 29 shall be the remedies, procedures, and rights this subchapter provides to any person alleging discrimination on the basis of disability in violation of section 12132 of this title.

42 U.S.C.A. § 12134 (West 1995). Regulations

(a) In general

Not later than 1 year after July 26, 1990, the Attorney General shall promulgate regulations in an accessible format that implement this part.

* * *

42 U.S.C.A. § 12201 (West 1995). Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

* * *

42 U.S.C.A. § 12210 (West 1995). Illegal Use of Drugs

(a) In general

For purposes of this chapter, the term "individual with a disability" does not include an individual who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

* * *

42 U.S.C.A. § 12211 (West 1995). Definitions

(a) Homosexuality and bisexuality

For purposes of the definition of "disability" in section 12102(2) of this title, homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter.

(b) Certain conditions

Under this chapter, the term "disability" shall not include — (1) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) compulsive gambling, kleptomania, or pyromania; or

(3) psychoactive substance use disorders resulting from current illegal use of drugs.

28 C.F.R. pt. 35, app. A (1997)

Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services (Published July 26, 1991)

* * *

Section 35.102 Application

This provision specifies that, except as provided in paragraph (b), the regulation applies to all services, programs, and activities provided or made available by public entities, as that term is defined in § 35.104. Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), which prohibits discrimination on the basis of handicap in federally assisted programs and activities, already covers those programs and activities of public entities that receive Federal financial assistance. Title II of the ADA extends this prohibition of discrimination to include all services, programs, and activities provided or made available by State and local governments or any of their instrumentalities or agencies, regardless of the receipt of Federal financial assistance. Except as provided in § 35.134, this part does not apply to private entities.

* * *

Paragraph (b)(8) also prohibits policies that unnecessarily impose requirements or burdens on individuals with disabilities that are not placed on others. For example, public entities may not require that a qualified individual with a disability be accompanied by an attendant. A public entity is not, however, required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except in

special circumstances, such as where the individual is an inmate of a custodial or correctional institution.

28 C.F.R. § 35.130. General prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b) (1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability —

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others[.]

* * *

(7) A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

28 C.F.R. § 35.151 New construction and alterations.

(a) Design and construction. Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the

facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.

(b) Alteration. Each facility or part of a facility altered by, on behalf of, or for the use of a public entity in a manner that affects our could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by individuals with disabilities, if the alteration was commenced after January 26, 1992.

(c) Accessibility standards. Design, construction, or alteration of facilities in conformance with the Uniform Federal Accessibility Standards (UFAS) (appendix A to 41 CFR part 101-19.6) or with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG) (appendix A to 28 CFR part 36) shall be deemed to comply with the requirements of this section with respect to those facilities, except that the elevator exemption contained at section 4.1.3(5) and section 4.1.6(1)(k) of ADAAG shall not apply. Departures from particular requirements of either standard by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is therefore provided.

* * *

28 C.F.R. § 35.190 (1997) Subpart G Designated Agencies

(a) The Assistant Attorney General shall coordinate the compliance activities of Federal agencies with respect to State and local government components, and shall provide policy guidance and interpretations to designated agencies to ensure the consistent and effective implementation of the requirements of this part.

(b) The Federal agencies listed in paragraph (b)(1) through (8) of this section shall have responsibility for the implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

* * *

(6) *Department of Justice*: All programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions; commerce and industry, including general economic development, banking and finance, consumer protection, insurance, and small business; planning, development, and regulation (unless assigned to other designated agencies); state and local government support services (e.g., audit, personnel, comptroller, administrative services); all other government functions not assigned to other designated agencies.

28 C.F.R. § 39.150 (1997) Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not —

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by handicapped persons;

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and

administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 39.150(a) would result in such alterations or burdens. The decision that compliance would result in such alteration or burdens must be made by the Attorney General or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that handicapped persons received the benefits and services of the program or activity.

Architectural and Transp. Barriers Compliance Board
36 C.F.R. § 1191.2 (1997)

Accessibility Guidelines for Buildings and Facilities

Americans with Disabilities Act (ADA)

U.S. Architectural & Transportation Barriers Compliance Board
1331 F Street, N.W., Suite 1000
Washington, D.C. 20004-1111

* * *

Paragraphs marked with an asterisk have related, nonmandatory material in the Appendix. In the Appendix, the corresponding paragraph numbers are preceded by an A.

DETENTION AND CORRECTIONAL FACILITIES.

12.1* General. This section applies to jails, holding cells in police stations, prisons, juvenile detention centers, reformatories, and other institutional occupancies where occupants are under some degree of restraint or restriction for security reasons. Except as specified in this section, detention and correctional facilities shall comply with the applicable requirements of 4.1 through 4.35. All common use areas serving accessible cells or rooms and all public use areas are required to be designed and constructed to comply with section 4.

EXCEPTION: In detention and correctional facilities the requirements for areas of rescue assistance in 4.1.3(9), 4.3.10, and 4.3.11 do not apply. In addition, the requirements of 4.1.3(16) apply only to public use areas.

12.2 Entrances.

12.2.1 Public Entrances. Entrances used by the public, including those that are secured, shall be accessible as required by 4.1.3(8). Public entrances are those entrances used by the general public, including those used by both visitors and inmates or detainees.

EXCEPTION: Entrances, doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Doors and doorways not operated solely by security personnel which are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible.

12.2.2. Other Entrances. Where entrances used by inmates or detainees and not the general public are provided, at least one such entrance shall comply with 4.14. This requirement is in addition to the entrances that are required to be accessible by 4.1.3(8). Where provided, passenger loading zones serving entrances subject to this provision shall comply with 4.6.6.

EXCEPTION: Entrances, doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Doors and doorways not operated solely by security personnel that are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible. Entrances subject to 4.14 are not required to be connected by an accessible route to

public transportation stops, accessible parking, or public streets or sidewalks.

12.2.3. Security Systems. Where security systems are provided at public or other entrances required to be accessible by 12.2.1 or 12.2.2, an accessible route complying with 4.3 shall be provided through fixed security barriers. Where security barriers incorporate equipment such as metal detectors, fluoroscopes, or other similar devices which cannot be made accessible, an accessible route shall be provided adjacent to such security screening devices to facilitate an equivalent path of travel.

12.3* Visiting Areas. In non-contact visiting areas where inmates or detainees are separated from visitors, the following elements, where provided, shall be accessible and located on an accessible route complying with 4.3:

(1) Cubicles and Counters. Five percent, but not less than one, of fixed cubicles shall be accessible according to 4.32 on both the visitor and detainee or inmate sides. Where counters are provided, a portion at least 36 in (915 mm) in length shall comply with 4.32 on both the visitor and detainee or inmate sides.

EXCEPTION: At non-contact visiting areas not serving accessible cells or rooms, the requirements of 12.3(1) do not apply to cubicles or counters serving detainees or inmates.

(2) Partitions. Solid partitions or security glazing separating visitors from inmates or detainees shall comply with 7.2(3).

12.4 Holding and Housing Cells or Rooms: Minimum Number and Dispersion.

12.4.1* Holding Cells and General Housing Cells or Rooms.

(1) Minimum Number. At least three percent, but not less than one, of the total number of housing or holding cells or rooms provided in a facility shall comply with 12.5.

(2) Dispersion. Accessible cells or rooms complying with 12.5 shall be dispersed among all categories and types of general housing and holding areas. This does not require an increase in the minimum number specified by 12.4.1(1), nor does it require proportionate distribution of accessible cells among different categories or types of cells.

12.4.2 Special Holding and Housing Cells or Rooms. In addition to the requirements of 12.4.1, where special holding or housing cells or rooms are provided, at least one serving each purpose shall comply with 12.5. An accessible special holding or housing cell or room may serve more than one purpose. Cells or rooms subject to this requirement include, but are not limited to, those used for purposes of protective custody, disciplinary detention, detoxification, and medical isolation.

12.4.3* Accessible Cells or Rooms for Persons with Hearing Impairments. In addition to the requirements of 12.4.1, at least three percent, but not less than one, of general housing or holding cells or rooms equipped with audible emergency warning systems or permanently installed telephones within the cell or room shall comply with the applicable requirements of 12.6.

12.4.4* Medical Care Facilities. Medical care facilities providing physical or medical treatment or care shall comply with the applicable requirements of 6.1, 6.3 and 6.4, if persons may need assistance in emergencies and the period of stay may exceed 24 hours. Patient bedrooms or cells required to be

accessible under 6.1 and 6.3 shall be provided in addition to any medical isolation cells required to be accessible under 12.4.2.

12.4.5 Alterations to Cells or Rooms. When holding or general housing cells or rooms are being altered in an existing facility, or portion thereof, at least three percent of the number being altered shall be made accessible according to 12.4.1 until the number of accessible cells or rooms equals the total number of accessible cells or rooms required for the facility under 12.4.1.

12.5 Requirements for Accessible Cells or Rooms.

12.5.1 General. Cells or rooms required to be accessible by 12.4 shall comply with 12.5.

12.5.2 Minimum Requirements. Accessible cells or rooms shall be on an accessible route complying with 4.3. Where provided within housing or holding cells or rooms, the following elements or spaces shall be accessible and connected by an accessible route.

(1) Doors and Doorways. All doors and doorways on an accessible route shall comply with 4.13.

EXCEPTION: Doors and doorways designed to be operated only by security personnel shall be exempt from 4.13.6, 4.13.9, 4.13.10, 4.13.11 and 4.13.12. Other doors and doorways not operated solely by security personnel which are subject to security requirements that prohibit full compliance with these provisions shall comply to the maximum extent feasible.

(2)* Restrooms. At least one toilet facility shall comply with 4.22 and one bathing facility shall comply with 4.23. Privacy screens shall not intrude on the clear floor space required for fixtures and the accessible route.

(3)* Beds. Beds shall have maneuvering space at least 36 in (915 mm) wide along one side. Where more than one bed is provided in a room or cell, the maneuvering space provided at adjacent beds may overlap.

(4) Drinking Fountains and Water Coolers. Drinking fountains shall be accessible to individuals who use wheelchairs in accordance with 4.15 and shall be accessible to those who have difficulty bending or stooping. This can be accomplished by the use of a "hi-lo" fountain; by providing one fountain accessible to those who use wheelchairs and one fountain at a standard height convenient for those who have difficulty bending; by providing a fountain accessible under 4.15 and a water cooler; or by providing other such means as would achieve the required accessibility for each group.

(5) Fixed or Built-in Seating or Tables. Fixed or built-in seating, tables and counters shall comply with 4.32.

(6) Fixed Benches. Fixed benches shall be mounted at 17 in to 19 in (430 mm to 485 mm) above the finish floor. The structural strength of the bench attachments shall comply with 4.26.3.

(7) Storage. Fixed or built-in storage facilities such as cabinets, shelves, closets and drawers, shall contain storage space complying with 4.25.

(8) Controls. All controls intended for operation by inmates shall comply with 4.27.

(9) Accommodations for persons with hearing impairments required by 12.4.3 and complying with 12.6 shall be provided in accessible cells or rooms.

* * *

Federal Property Management Regulations pt. 101, subpt. 101-19.6, app. A (1997)

Appendix A to Subpart 101-19.6 — Uniform Federal Accessibility Standards

4.1.4 Occupancy Classifications

(4) Assembly. Assembly occupancy includes, among others, the use of a building or structure, or a portion thereof, for the gathering together of persons for purposes such as civic, social or religious functions, recreation, food or drink consumption, or awaiting transportation. A room or space used for assembly purposes by less than fifty (50) persons and accessory to another occupancy shall be included as part of that major occupancy. For purposes of these standards, assembly occupancies shall include the following:

Facilities

* * *

Courtrooms (public areas)

* * *

(5) **Business.** Business occupancy includes, among others, the use of a building or structure, or a portion thereof, for office, professional or service type transactions, including storage of records and accounts.

Facilities

* * *

Police stations

* * *

(9) **Institutional**. Institutional occupancy includes, among others, the use of a building or structure, or any portion thereof, in which people have physical or medical treatment or care, or in which the liberty of the occupants is restricted. Institutional occupancies shall include the following subgroups:

* * *

(c) Institutional occupancies where the occupants are under some degree of restraint or restriction for security reasons including:

Facilities	Application
Jails Prisons Reformatories Other detention or correctional facilities	5 percent of residential units available, or at least one unit, whichever is greater; all common use, visitor use, or areas which may result in employment of physically handicapped persons.

45 C.F.R. § 84.12 (1997)

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) Making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program; factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

* * *

37622 Federal Register/Vol. 45. No. 108/Tuesday, June 3, 1980/Rules and Regulations

Subpart G — Nondiscrimination Based on Handicap in Federally Assisted Programs — Implementation of Section 504 of the Rehabilitation Act of 1973 and Executive Order 11914

* * *

General Provisions

§ 42.501 Purpose.

The purpose of this subpart is to implement section 504 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination on the basis of handicap in any program receiving Federal financial assistance.

§ 42.502 Application.

This subpart applies to each recipient of Federal financial assistance from the Department of Justice and to each program receiving or benefiting from such assistance. The requirements of this subpart do not apply to the ultimate beneficiaries of Federal financial assistance in the program receiving Federal financial assistance.

§ 42.540 Definitions.

* * *

(h) The term "program" means the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections.

* * *

(j) "Benefit" includes provision of services, financial aid or disposition (*i.e.*, treatment, handling, decision, sentencing, confinement, or other prescription of conduct).

* * *

Appendix B — Analysis of Final Rule

A. General Provisions

This subpart prohibits discrimination on the basis of handicap in any program, activity or facility receiving Federal financial assistance (§ 42.501). Section 504 protects not only the ultimate beneficiaries of Federal assistance statutes (*e.g.*, students, prisoners, general public) as identified in the Federal grant statutes directly or by inference, but also nonbeneficiary participants (*e.g.*, employees working in the program receiving Federal financial assistance regardless of whether a primary objective of the Federal assistance includes providing employment opportunities). The subpart applies to all Federal assistance programs administered by the Department and requires all recipients of such assistance to comply with the requirements of the subpart (§ 42.502). The subpart not only applies to grants, contracts and cooperative agreements entered into after the effective date of the subpart, but also applies to any Federal financial assistance previously extended which continues at the time the subpart becomes effective.

The subpart sets forth a variety of illustrative examples to identify conduct which is unlawfully discriminatory and requirements to maintain Federally assisted programs free of unlawful discrimination (§ 42.503).

* * *

C. Physical and other Accessibility to Programs

The subpart prohibits the exclusion of qualified handicapped persons from Federally assisted programs because a recipient's facilities are not readily accessible or usable. The recipient is not required to have each of its existing facilities or every part of a facility accessible to and usable by handicapped persons. The requirement is that the program, when viewed in its entirety, must be readily accessible to and usable by handicapped persons. Structural changes may be unnecessary where other less costly or burdensome methods may be equally effective.

* * *

The examples which follow also set forth a number of situations in which recipients are required under this subpart to provide auxiliary aids (§ 42.503(f) to remove communications barriers that prevent accessibility to Federally assisted programs. These examples are included as the result of a number of comments which recommended that the Department provide additional guidance in this area.

* * *

2. *Detention and Correctional Agencies and Facilities.* These agencies include jails, prisons, reformatories and training schools, work camps, reception and diagnostic centers, pre-release and work release facilities, and community-based facilities. Where local or State policy prohibits the detention or incarceration of wheelchair users, no structural modification to detention or correctional facilities to accommodate wheelchair users is required. Where there is no such exclusionary policy, structural modifications may be unnecessary where alternate

accessible facilities are available (*e.g.*, short term detention in the prisoner's home or at a medical facility). Where local policy precludes alternate detention facilities, a detention agency would be required to make structural modifications to accommodate detainees or prisoners in wheelchairs. In such circumstances, however, not every detention facility of the agency would have to become accessible. Only a sufficient number of detention cells need to accessible to wheelchair users as can be reasonably expected to be detained based on the agency's prior experience. A different problem arises, however, when accessibility requirements are imposed on small, independently operated community based facilities used, for example, for the placement of juveniles in a home setting. A metropolitan area may have a number of such homes. Each such home receiving assistance from the Department with fewer than fifteen employees is not required to be accessible to handicapped persons as long as a sufficient number of homes are accessible in the service area. If a home, after consultation with the handicapped person concerned, determines that its facilities are not accessible to such person because of the person's handicapping condition, it is the responsibility of the home to locate an accessible home providing equivalent services (§ 42.522(c)).

All detention and correctional agencies must provide accessibility for handicapped visitors (*e.g.*, accessible visiting rooms, restrooms) since the prisoner's right to receive visitors is an element of the program administered by the agencies. Where a facility's visitation area is inaccessible to the handicapped, a detention or correctional agency has the option to (a) house the prisoner in a facility which is accessible to handicapped visitors, (b) move the prisoner to an alternate, accessible area either within or outside the facility for visits from wheelchair users, (c) make structural modifications to make the visitation area accessible. It should be kept in mind that the benefit provided is

the right to visit rather than the right to visit in any particular area.

Facilities available to all inmates or detainees, such as classrooms, infirmary, laundry, dining areas, recreation areas, work areas, and chapels, must be readily accessible to any handicapped person who is confined to that facility. Beyond insuring the physical accessibility of facilities, detention and correctional agencies must insure that their programs and activities are accessible to handicapped persons. For example, correctional agencies should provide for the availability of qualified interpreters (certified, where possible, by a recognized certification agency) to enable hearing impaired inmates to participate on an equal basis with nonhandicapped inmates in the rehabilitation programs offered by the correctional agencies (*e.g.*, educational programs).

Correctional officials should take into account any handicaps which inmates may have in classifying them. In making housing and program assignments, such officials must be mindful of the vulnerability of some handicapped inmates to physical and other abuse by other inmates. The existence of a handicap alone should not, however, be the basis for segregation of such inmates in institutions or any part thereof where other arrangements can be made to satisfy safety, security and other needs of the handicapped inmate.

(2)
Supreme Court, U.S.
FILED
DEC 19 1997
CLERK

No. 97-1113

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

GRANVILLE AMOS, *et al.*,
Petitioners,

v.

MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Supplemental Appendix to Petition for a Writ of Certiorari

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63 pp

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Granville Amos; Harvey W. Bloxom; Michael A. Holt; Teddy T. Jones; Charles Madison; Howard Megginson; Boris Prymeran; Gary Ralph; John Smith; Michael Hilman Smith; William Lewis Smith; Calvin J. Whiting; Dennis Brian Absher,

Plaintiffs-Appellants,

and

Winifried Lee Rhodes,

Plaintiff,

No. 96-7091

Maryland Dept. of Public Safety and Correctional Services; Roxbury Correctional Institution, Hagerstown, Maryland; Richard Lanham, Sr., in his official capacity as Commissioner, Maryland Division of Correction; John P. Galley, in his official capacity as Warden, Roxbury Correctional Institution; Ronald Moats, Warden, Roxbury Correctional Institution; William Smith, Warden, Maryland House of Correction,

Defendants-Appellees.

United States of America,

Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland at Baltimore.

J. Frederick Motz, Chief District Judge.
(CA-91-508-JFM, CA-95-524-JFM)

Argued: April 10, 1997
Decided: September 22, 1997

Before MURNAGHAN and WILLIAMS, Circuit Judges, and CLARKE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by published opinion. Judge Williams wrote the opinion, in which Senior Judge Clarke joined. Judge Murnaghan wrote an opinion dissenting in part.

COUNSEL

ARGUED: Marjorie Lynn Rifkin, National Prison Project, ACLU FOUNDATION, Washington, D.C.; Andrew Marc Dansicker, HOGUET, NEWMAN & REGAL, New York, New York, for Appellants. John Burnside Howard, Jr., Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Baltimore, Maryland, for Appellees. **ON BRIEF:** Margaret Winter, Eric Balaban, National Prison Project, ACLU FOUNDATION, Washington, D.C. for Appellants. J. Joseph Curran, Jr., Attorney General of Maryland, Carmen M. Shepard, Assistant Attorney General, Stephanie Lane-Weber, Assistant Attorney General, Baltimore, Maryland for Appellees. Deval L. Patrick, Assistant Attorney General David K. Flynn, Lisa Wilson Edwards, Linda F. Thome, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae.

OPINION

WILLIAMS, Circuit Judge:

Thirteen disabled Maryland state prisoners incarcerated at the Roxbury Correctional Institution (RCI) in Hagerstown, Maryland, brought this suit against RCI; the Maryland Department of Public Safety and Correctional Services (MDPSCS); Richard Lanham, the Commissioner of the Maryland Division of Correction; and John P. Galley, the Warden of RCI (collectively Appellees). The prisoners complain, *inter alia*, that Appellees (1) denied them the opportunity to participate in work release and pre-release programs because of their disabilities, resulting in a denial of benefits, training, and rehabilitation, and in longer sentences; (2) denied them equal access to bathrooms, athletic facilities, the "honor tier," and food services at RCI because of their disabilities; (3) denied them adequate medical attention and hygienic facilities; (4) failed to make reasonable accommodations to ensure the safety of disabled inmates; and (5) assigned them to RCI because of their disabilities, thereby depriving them of the opportunity to serve their sentences at available facilities closer to their homes. The prisoners claim that Appellees' conduct violated Title II of the Americans with Disabilities Act (ADA), *see* 42 U.S.C.A. §§ 12131-12165 (West 1995 & Supp. 1997); § 504 of the Rehabilitation Act of 1973, *see* 29 U.S.C.A. § 794 (West Supp. 1997). The prisoners also brought suit under 42 U.S.C.A. § 1983 (West Supp. 1997), claiming that Appellees' conduct violated the Eighth Amendment of the United States Constitution.

The district court granted summary judgment for Appellees. Relying on our decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), the district court concluded that the

ADA and the Rehabilitation Act do not apply to state correctional facilities. We agree. After painstakingly reexamining our decision in *Torcasio*, we are convinced that *Torcasio*'s analysis of the issue is, indeed, compelling, and that the Rehabilitation Act and the ADA do not apply in the state prison context. Nothing in the opinions of those courts holding to the contrary even begins to refute the careful analysis we undertook in *Torcasio*. In reaching the conclusion that these Acts do not apply, and could not possibly be applied in the context of prison facilities, we are (and we believe that the Supreme Court will ultimately find itself) persuaded in no small measure by the extraordinary circuitous statutory analyses which those courts reaching the contrary conclusion have undertaken and the considerable extra-interpretative energies that those courts have been forced to expend in order to limit the systemic chaos that would otherwise have followed on their holdings and these statutes apply to the Nation's myriad state prisons. In addition, the district court determined that the prisoners had failed to raise genuine issues of fact material on the question of whether their keepers were deliberately indifferent to their serious medical needs. Again, we agree. Accordingly, we affirm the district court's grant of summary judgment for Appellees on the prisoners' statutory and constitutional claims.

I.

Although Appellees dispute many of the factual allegations made by the prisoners, we set forth the facts in the light most favorable to the prisoners for purposes of evaluating the appropriateness of summary judgment. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (holding that in determining whether summary judgment is appropriate, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"); *see also* Fed. R. Civ. P. 56(c). Because we conclude that the ADA and the Rehabilitation Act do not apply to state prisons, we recite only

the facts relevant to the prisoners' constitutional claims.

Prisoners at RCI, disabled and non-disabled alike, receive medical attention when necessary from Prison Health Services, Inc. (PHS), a private medical care contractor. PHS provides a broad array of medical services, including general dispensary services, sick-call services, and infirmary services. In addition, PHS uses Washington County Hospital as an adjunct medical care provider for medical services that cannot be performed at the prison.

Prisoners may complain about the medical care provided (or not provided) through an Administrative Remedy Procedure (ARP) in place at the prison. Pursuant to this procedure, a prisoner fills out an ARP form to complain about medical care he has received or to request medical attention, which is transmitted to the Warden. The Warden then forwards the complaint or request to his administrative remedy coordinator for investigation and resolution.

Six of the thirteen disabled prisoners in this case — Granville Amos, William Smith, Michael Smith, Howard Megginson, Gray Ralph, and Boris Prymerman — contend that prison officials were deliberately indifferent to their serious medical needs in violation of the Eighth Amendment.[1] Appellant Granville Amos, who is partially paralyzed as the result of a 1989 gunshot wound, filed six ARPs with the Warden between June 3, 1991, and November 22, 1991, complaining that he was not receiving in a timely fashion medication for back pain and spasms. In each instance, the Warden promptly responded to Amos' complaint by acknowledging "that a gap in your medication did occur with the Dispensary at least partially

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[1] The claims of the remaining prisoners were brought solely under the Rehabilitation Act and the ADA.

responsible," and by assuring Amos that steps were being taken to "decrease the possibility of a reoccurrence of this problem." (J.A. at 869.) The Warden informed Amos that he was "directing the CMS Medical Provider to *insure* [sic] that this does not reoccur." (J.A. at 872.) In response to Amos' final ARP, the Warden stated:

> In spite of all efforts by staff, the problems with prescription medications has [sic] persisted through most of November due to the non-delivery by the Pharmacy. It is recognized that these difficulties do not negate the medical suppliers [sic] obligation to provide these medications. The new Pharmacy is now on line an dis anticipated that a dramatic lessening of lapses of this type will occur.

(J.A. at 888.)

Appellant William Smith is partially paralyzed and wheelchair dependent, and suffers from bilateral carpal tunnel syndrome, hypertension, and lymphocytic leukemia. In 1992, a physician suggested that Smith consider undergoing surgery to correct his carpal tunnel syndrome. Unidentified prison employees then told Smith that he had been scheduled for carpal tunnel surgery, but the surgery was never performed. In addition, in 1992, a physician recommended diagnostic tests to ascertain the cause of Smith's back pain. Like the surgery, the tests have never been performed.

Appellant Michael Smith, also paralyzed and confined to a wheelchair, suffers from chronic back pain, hypertension, and bladder problems. In 1988, he was prescribed Valium to prevent leg spasms, and received Valium until his release from prison in 1991. In 1993, he was incarcerated again, first at the Maryland

Penitentiary, and then, beginning in December 1994, at RCI. Although Smith received Valium while incarcerated at the Maryland Penitentiary, medical staff at RCI prescribed substitute medication that was not as effective as Valium. Smith submitted two "Sick-Call Request & Encounter Forms," one on December 9, 1995, and another on March 14, 1995. Each requested that a physician see him about the problem with his medication. On March 17, 1995, Dr. Charles E. Potts of the prison medical staff wrote to Smith that he would "arrange for a meeting with you next week to address your concerns." (J.A. at 866.) A few weeks later, in April 1995, Smith's Valium prescription was renewed.

Appellant Howard Megginson, also paralyzed and confined to a wheelchair, suffered recurrent urinary tract infections while imprisoned at RCI. He filed two ARPs "concerning the urine [sic] infection." (J.A. at 727.) In both instances, according to his own testimony, in response to the ARPs, he was seen and treated by physicians.

Appellant Gary Ralph has "cerebral palsy, [a] history of a femoral fracture, and chronic back pain." (J.A. at 602.) In June 1995, he began experiencing severe back and leg pain. At some point, after he began experiencing back and leg pain, Ralph filed ARPs informing the Warden of his condition and need for medical attention. As of June 27, 1995, Ralph was no longer assigned to RCI. In August 1995, Ralph received treatment at the University of Maryland Hospital where further diagnostic testing was recommended. Subsequently, "[s]pecialists have recommended conservative treatment for [Ralph's] lumbosacral disc disease. [Ralph] is receiving chronic pain medications and will have ongoing neurosurgical evaluations at the University of Maryland to provide specialty consultation." (J.A. at 602.)

Appellant Prymerman, who has "a lumbosacral fracture with chronic back pain" (J.A. at 602), "can walk with [a] cane or crutches, but uses [a] wheelchair most of [the] time due to pain" (J.A. at 830). On November 7, 1991, Dr. Donald Patterson recommended surgery for his back problem. A notation on Prymerman's medical chart, dated December 1, 1992, states: "[S]till waiting on spinal fusion decision by Dr. Patterson. He (Mr. Prymerman) continues complaining of severe pain." (J.A. at 830.) Prymerman never filed an ARP regarding the recommended back surgery.

We begin with the statutory claims.[2] In granting summary judgment for Maryland on the prisoners' ADA and Rehabilitation Act claims, the district court stated, citing our decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), that "a three-judge panel of the Fourth Circuit strongly stated its view that those Acts do not apply to state prisons." (J.A. at 41.) The district court concluded that our treatment in *Torcasio* of the applicability of the ADA and the Rehabilitation Act to state prisons was not controlling, but nevertheless decided "that considerations of sound judicial management and prudent use of resources dictate that I follow the *Torcasio* dictum." (J.A. at 41.) The court stated that if "the Fourth Circuit concludes on appeal in this case that the *Torcasio* dictum was incorrect, the case will simply be remanded for further proceedings." (J.A. at

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[2]Because Congress has directed that Tiele II of the ADA be interpreted in a manner consistent with § 504 of the Rehabilitation Act, *see* 42 U.S.C.A. §§ 12134(b), 12201(a) (West 1995), we combine the analysis of the prisoners' ADA and Rehabilitation Act claims, *see Shafer v. Preston Mem'l Hosp.*, 107 F.3d 274, 276 n.3 (4th Cir. 1997); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264 n.9 (4th Cir. 1995); *Tyndall v. National Educ. Ctrs., Inc.*, 31 F.3d 209, 213 n.1 (4th Cir. 1994).

41.)[3]

The prisoners contend "that the view expressed by this Court in *Torcasio*, that the statutes do not apply to prisons and prisoners, was incorrect." (Appellants' Br. At 20.) They claim that the ADA and the Rehabilitation Act apply to state prisons because both statutes are written in broad terms that clearly encompass state correctional facilities. Even if the coverage of the statutes is ambiguous, they argue, "any such ambiguity is entirely overcome by regulations promulgated by the [Department of Justice], to which Congress delegated the authority to implement the statutes." (Appellants' Br at 20.)[4] Like the prisoners, the amicus curiae Department of Justice (DOJ) contends that the plain language of both statutes establishes that the statutes apply to state prisons, that DOJ regulations confirm that the statutes apply to state prisons, and that our discussion of the applicability of the statutes to state prisons in *Torcasio* was poorly reasoned dictum that should not control the outcome of this case. (DOJ Br. At 5-21.)

In *Torcasio*, the principal issue was whether it was clearly established at the time the plaintiff in that case was imprisoned that Title II of the ADA and § 504 of the

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[3]The district court also stated that "[p]resumably, the court will at least adhere to the *Torcasio* holding relating to the issue of qualified immunity, thereby removing any monetary damage claims under the two Acts." (J.A. at 41 n.1.)

[4]The prisoners also contend that the district court erred in holding, in accord with *Torcasio*, that Appellees are entitled to qualified immunity from suit for damages under the ADA and the Rehabilitation Act. They argue that unlike the plaintiff in *Torcasio*, they seek statutory damages from MDPSCS and RCI, two state governmental entities to which the defense of qualified immunity is not available. (Appellants' Br. At 32-35.)

Rehabilitation Act apply to state prisons, and whether the individual defendants in that case were entitled to dismissal of the claims against them on qualified immunity grounds. We held that it was not clearly established that the statutes applied to state prisons, and that therefore the individual defendants were entitled to qualified immunity. *See id.* At 1352. While deciding only that the applicability of the ADA and the Rehabilitation Act to state prisons was not clearly established at the time of the alleged discrimination, we strongly suggested that the ADA and the Rehabilitation Act do not apply at all to state prisons and prisoners. *See id.* At 1344-52. Because *Torcasio*'s review of the language of the statutes, the relevant constitutional principles, and the manner in which our sister Circuits have addressed the issue was especially thorough, we begin our analysis with a full statement of what we decided in that case.

A.

Anthony Torcasio, a Virginia state prisoner who alleged that he was disabled because of his "morbid obesity," filed an action against officials of the Virginia Department of Corrections (VDOC), claiming that they had failed reasonably to accommodate his disability in violation of the ADA and the Rehabilitation Act. *See Torcasio*, 57 F.3d at 1342. The individual defendants moved for summary judgment on the ground that they were entitled to qualified immunity. The district court held that the ADA and the Rehabilitation Act applied to state prisoners, *see id.* At 1343 (citing *Torcasio v. Murray*, 862 F. Supp. 1482, 1490-91 (E.D. Va. 1994)), and then "proceeded to analyze, literally request by request, whether the VDOC officials' responses to Torcasio's requests for accommodation were reasonable," *id.* The district court concluded that the prison officials were entitled to qualified immunity with respect to some of Torcasio's complains, but

were not entitled to qualified immunity with respect to others. The State Virginia and the individual defendants appealed.

1.

On appeal, we began our analysis with the language of the two statutes and noted "that certain portions of both statutes employ language which, when viewed in isolation, appears all-encompassing." *Id.* At 1344. Title II of the ADA prohibits "public entities" from discriminating against disabled individuals: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C.A. § 12132 (West 1995). A "public entity" is broadly defined under the statute to be "*any* State or local government' and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C.A. § 12131(1) (West 1995) (emphasis added). Similarly, the Rehabilitation Act prohibits discrimination against disabled individuals "under *any* program or activity receiving Federal financial assistance," 29 U.S.C.A. § 794(a) (West Supp. 1997) (emphasis added), and defines "program or activity" to include "*all* of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." 29 U.S.C.A. § 794(b)(1)(A) (emphasis added).[5]

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[5]In the case before us, Appellees filed a motion to dismiss the Rehabilitation Act claims, arguing that RCI receives no federal financial assistance. The district court denied the motion, holding that because the Maryland Department of Corrections receives federal funds, and because RCI is a program or activity administered by state government, both entities are subject to the Rehabilitation Act. For purposes of this appeal, we assume without deciding that Appellees MDPSCS and RCI receive federal financial assistance.

We recognized the apparent breadth of the statutory language, but stated: "We are not persuaded that this language . . . even viewed in isolation from the arguably narrowing text found elsewhere in the acts, brings state prisons 'squarely' within the reach of these acts." *Torcasio*, 57 F.3d at 1344. Accordingly, we stated that we were reluctant to apply the statutes to state prisons and prisoners, "[a]bsent a far clearer expression of congressional intent." *Id.*

Our reluctance to extend the coverage of the statutes to state prisons and prisoners absent a far clearer expression of congressional intent was grounded on the "ordinary rule of statutory construction" that Congress must make its intention to alter the constitutional balance between the States and the Federal Government unmistakably clear in the statute's language:

> [I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985) *see also Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984) . . . Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), or if it intends to impose a condition on the grant of federal moneys, *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 16 (1981); *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of

> clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971).

Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (internal parallel citations omitted). We observed that pursuant to Supreme Court directives, "where application of a federal statute to a state 'would upset the usual constitutional balance of federal and state powers[,] . . . "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance.'" *Torcasio*, 57 F.3d at 1344-45 (alteration in original) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero*, 473 U.S. at 243)).

In applying this "clear statement" principle, we determined that "[i]t cannot be disputed that the management of state prisons is a core state function." *Id.* At 1345; *see also id.* (Citing *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (holding that "[o]ne of the primary functions of government is the peservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task"), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons.")). As support for the proposition that the management of state prisons is a core state function, we cited our decision in *Harker v. State Use Industries*, 990 F.2d 131 (4th Cir. 1993), which held that state prisoners involved in an employment skills development program in prison were not entitled to the minimum wage mandated by the Fair Labor Standards Act (FLSA). *See Torcasio*, 57 F.3d at 1345; *see also id.* At 1345 n.4

(noting that "[m]ost courts have been similarly unwilling to extend the protections of the FLSA to prison inmate" and citing cases). We also quoted a then-recent Fourth circuit decision (which itself cited Supreme Court precedent) establishing that in the Eighth Amendment context, "absent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons or to substitute their judgment for that of the trained penological authorities charged with the administration of such facilities.'" *Id.* At 1345-46 (quoting *Taylor v. Freeman* 34 F.3d 266, 268 (4th Cir. 1994) (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Procunire*, 416 U.S. at 396; *Preiser*, 411 U.S. at 475)).

We determined that the unwillingness of federal courts to intrude into the core state function of managing prisons "is in significant measure motivated by the realization that principles of comity and federalism apply with special force in the context of correctional facilities." *Torcasio*, 57 F.3d at 1346 (citing *Procunier*, 416 U.S. at 405 (stating that "where state penal institutions are involved, federal courts have . . . reason for deference to the appropriate prison authorities"); *Preiser*, 411 U.S. at 492 (holding that the "internal problems of state prisons involve issues [that are] preculiarly within state authority and expertise")).

With these principles in mind, we determined that applying the ADA and the Rehabilitation Act to state prisons would improperly alter the "usual constitutional balance between the States and the Federal Government," *Atascadero*, 473 U.S. at 242: "[A]pplication of the ADA and Rehabilitation Act would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security procoedures."

Torcasio, 57 F.3d at 1346. We thus held that the broad, non-specific language contained in portions of the ADA and the Rehabilitation Act did not make unmistakably clear that the statutes applied to state prisons during the time of Anthony Torcasio's incarceration. We added: "Because the management of state prisons implicates 'decision[s] of the most fundamental sort for a sovereign entity,' Congress must speak unequivocally before we will conclude that it has 'clearly' subjected state prisons to its enactments." *Id.* (alteration in original) (citation omitted) (quoting *Gregory*, 501 U.S. at 460).

In addition to determining that the definitional sections of the ADA and the Rehabilitation Act relied upon by the plaintiff, namely 42 U.S.C.A. § 12131(1) and 29 U.S.C.A. § 794(b)(1)(A), do not state in unmistakably clear terms that the ADA and the Rehabilitation Act apply to state prisons and prisoners, we also determined that other operative provisions of the statutes "are much less naturally read as including state prisons than are the aforementioned provisions." *Torcasio*, 57 f.3d at 1346. First, we noted that although the ADA's definition of "public entity" is broad, "it is still true that prisons are not expressly mentioned in the statute, and they certainly do not come readily to mind as the type of institution covered." *Id.* at 1346 n.5. We further asserted that

> [e]ven the name ascribed to Title II [of the ADA] — "Public Services" — connotes a ban on discrimination in services provided to the public, not in the prison context where the public is excluded. State prisons thus do not fit neatly within the definition of the "public entities" to which the ADA applies.

Id. Second, we pointed to 42 U.S.C.A. § 12131(2), in which the ADA defines a "qualified individual with a disability" as a

person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities." We held that correctional facilities "do not provide 'services,' 'programs,' or 'activities' as those terms are ordinarily understood." *Torcasio*, 57 F.3d at 1347. We determined that "[t]he terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will." *Id.* We therefore concluded that only a "superficial reading of the statutes" would support a conclusion that state prisons are subject to the requirements of the ADA and the Rehabilitation Act: "The recognition that the terms of the ADA and Rehabilitation Act are ill-fitting, at best, in the context of correctional facilities, reinforces our conclusion that the applicability of the acts to state prisons is far from clear on the face of the laws." *Id.*

2.

After assessing the statutory language and relevant constitutional principles, we analyzed the manner in which our sister Circuits have addressed the question of whether the ADA and the Rehabilitation Act apply to state prisons. We began by noting that the Ninth Circuit has "squarely held that the Rehabilitation Act applies to prisons." *Id.* at 1349 (citing *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988)). We noted, however, that the Ninth Circuit had "retreated" significantly from its holding in *Bonner*:

> In *Gates v. Rowland*, 39 F.3d 1439, 1446-47 (9th Cir. 1994), the court considered "how the Act is to be applied in a prison setting," and observed, "[t]he Act was not designed to deal specifically with the prison environment; it was intended for

> general societal application. There is not indication that Congress intended the Act to apply to prison facilities irrespective of the reasonable requirements of effective prison administration." Thus, the court held that "the applicable standard for the review of the Act's statutory rights in a prison setting [is] equivalent to [the standard for] the review of constitutional rights in a prison setting." *Id.* At 1447.

57 F.3d at 1349 n.7 (alterations in original). We stated that "we consider *Gates* to be an indication that the Ninth Circuit is beginning to rethink its decision in *Bonner* that state prisons are subject to the requirements of the Rehabilitation Act.' *Id.*

We then acknowledged that the Eleventh Circuit, in *Harris v. Thigpen*, 941 F.2d 1495 (11th Cir. 1991), expressed its approval of *Bonner*. *See Torcasio*, 57 F.3d at 1349 (citing *Harris*, 941 F.2d at 1522 n.41). We also stated, however, that this expression of approval, in addition to being buried in a footnote, was dictum because the issue of whether the Rehabilitation Act applies to state prisons was not before the court. *See id.* At 1349-50 (discussing *Harris* dictum).

Next, we discussed the Tenth Circuit's determination that the Rehabilitation Act "is inapplicable to *federal* prisoners." *See id.* at 1350. We noted that "[i]n *Williams v. Meese*, 926 F.2d 994 (10th Cir. 1991), the Tenth Circuit held that a federal prisoner could not invoke [§ 504] of the Rehabilitation Act because 'the Federal Bureau of Prisons does not fit the definition of "programs or activities" governed by [the Rehabilitation Act].'" *Torcasio*, 57 F.3d at 1350 (alteration in original) (quoting *Williams*, 926 F.2d at 997). We understood *Williams* to be a broad ruling that state prisons, like their federal counterparts, "are not subject to the Rehabilitation Act because

they do not sponsor 'programs or activities' as those terms are defined in the Rehabilitation Act.' *Id.* We concluded, for purposes of qualified immunity, that the conflict between the Ninth and Tenth Circuits was enough to show that it was not "clearly established" at the time of the alleged discrimination that the ADA and the Rehabilitation Act apply to state prisons. *See id.*

B.

Subsequent to our decision in *Torcasio*, at least three of our sister Circuits have confronted the issue of whether the ADA and the Rehabilitation Act apply to state prisons. *See White v. Colorado*, 82 F.3d 364 (10th Cir. 1996); *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997); *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3rd Cir. 1997).[6] In *White*, 82 F.3d at 364, the Tenth Circuit confirmed the understanding we expressed in *Torcasio* of that Circuit's *Williams* decision. *White* rejected, "[f]or the same reasoning relied upon in *Williams*," a *state* prisoner's allegation that Colorado prison officials violated the ADA and the Rehabilitation Act by denying him prison employment opportunities because of his disability. *See id.* at 367. *White* therefore held that state prisons do not fit the definition of "programs or activities" governed by the statutes. *Cf. Williams*, 926 F.2d at 997.

In *Bryant v. Madigan*, 84 F.3d 246 (7th Cir. 1996), the

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[6]*See also Duffy v. Riveland*, 98 F.3d 447 (9th Cir. 1996) (reviewing under *Bonner* and *Gates* inmate's ADA and Rehabilitation Act claims); *Inmates of Allegheny County Jail v. Wecht*, 93 F.3d 1124 (3rd Cir.) (holding that ADA and Rehabilitation Act apply to state prisons), *vacated* 93 F.3d 1146 (3rd Cir. 1996) (granting rehearing en banc).

Seventh Circuit held that the ADA did not provide a cause of action to a disable state prisoner to challenge the prison's failure to provide guardrails on his bed. Chief Judge Posner, writing for the court, recognized that the ADA contains "no express exclusion" of state prisons, but stated:

> It is very far from clear that prisoners should be considered "qualified individuals[s]" within the meaning of the Act. Could Congress really have intended disabled prisoners to be mainstreamed into an already highly restricted prison society? Most rights of free Americans, including constitutional rights such as the right to free speech, to the free exercise of religion, and to marry, are curtailed when asserted by prisoners; and there are formidable practical objections to burdening prisons with having to comply with the onerous requirements of the Act, especially when we reflect that alcoholism and other forms of addiction are disabilities within the meaning of the Act and afflict a substantial proportion of the prison population.

Id. At 248. Chief Judge Posner stated further that "Judge-made exceptions to laws of general applicability are justified to avoid absurdity." *Id.* At 248-49 (citation omitted). An exception to the ADA for prisoners, he suggested, "though not express, may have textual foundation in the term 'qualified individual.'" *Id.* At 249. Despite strongly suggesting that the ADA does not apply to prisons, the *Bryant* court ultimately left the question open by determining that even if the Act applied, the plaintiff had failed to state a claim. *See id.* At 249 ("Even if there were (as we doubt) *some* domain of applicability of the Act to prisoners, the Act would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners.").

Recently, the Seventh Circuit, in an opinion again authored by Chief Judge Posner, recanted its strong suggestion in *Bryant* that the ADA has no application to prisons. In *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997), the court held, despite the reservations it expressed in *Bryant*, that the ADA and the Rehabilitation Act apply to state prisons. *See id.* At 483, 487. In *Crawford*, the plaintiff, a former state prisoner, complained that because of his blindness he had been denied access to educational programs, the library, and the dining hall at the prison where he was incarcerated. Because the district court dismissed the suit on the pleadings, the sole question before the court was whether the ADA and the Rehabilitation Act apply to state prisons. *See id.* At 483.

Beginning with the plain language of the statute, the *Crawford* court conceded that "[i]ncarceration itself is hardly a 'program' or 'activity' to which a disabled person might wish access." *Id.* (citing *Bryant*, 84 F.3d at 249). The court conceded further that literal application of the statute to prisons "might seem absurd," *id.* At 486:

> Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off.

Id. The court conceded still further that "the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment," and admitted that "application [of the ADA] to prisoners might produce some

anomalies." *Id.* Nevertheless, the court reversed the course it had taken in *Bryant* and determined that the broad statutory language brought state prisons within the statutes' scope.

The court recognized that statutes are often interpreted in a manner that creates an exception to broad statutory language. *See id.* At 484-85. As an example, the court noted that courts have uniformly excluded prisoners employed in a prison fro the minimum-wage and maximum-hours provisions of the Fair Labor Standards Act (FLSA), despite the fact that the "FLSA defines 'employee' sweepingly; prisoners fall within [the statute's] literal scope; and there is no express exception for or applicable to prisoners." *Id.* At 484 (citations omitted). Although acknowledging that "the failure to exclude prisoners from the [ADA] may well . . . have been an oversight," *id.* At 487, the court nevertheless stated that "courts do not create exceptions to statutes every time it seems that the legislature overlooked something," *id.* At 484.

Without mentioning our explication in *Torcasio* of the clear statement rule, the *Crawford* court determined that the rule is inapplicable to the question of whether the ADA and the Rehabilitation Act apply to state prisons — despite agreeing that "[p]rison administration is indeed a core function of state government." *Id.* At 485. The court held that because the defendant state prison conceded that the ADA applies to its relations with employees and visitors, "the clear-statement rule does not carry this particular core function of state government outside the scope of the Act." *Id.* The court also declined to create an exception "to save the statute from generating absurd consequences." *Id.* At 485.

The *Crawford* court concluded by reinstating the prisoner's suit. The court recognized that on remand, the defendant might be able to show that there was no reasonable

accommodation possible, or that any necessary accommodation would impose an undue burden on the prison system. *See id.* At 487. "Terms like 'reasonable' and 'undue' are relative to circumstances," the court opined, "and the circumstances of a prison are different from those of a school, an office, or a factory, as the Supreme Court has emphasized in the parallel setting of prisoners' constitutional rights." *Id.* (Citing *Turner v. Safley*, 483 U.S. 78, 84-91 (1987)). Thus, the court recognized — like the Ninth Circuit before it, *see Gates*, 39 F.3d at 1446-47 — that "security concerns . . . are highly relevant to determining the feasibility of the accommodations that disabled prisoners need in order to have access to desired programs and services." *Crawford*, 115 F.3d at 487. The court declined, however, to outline the meaning of "reasonable accommodation" and "undue burden"in the prison context.

Drawing heavily from the Seventh Circuit's *Crawford* opinion, the Third Circuit also recently held that the ADA and the Rehabilitation Act apply to state correctional facilities. *See Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3rd Cir. 1997). In *Yeskey*, the court determined that statutory language was "all-encompassing" and "broad" and therefore brought state prisons within the scope of the statutes. *See id.* at 170-71. Unlike the Seventh Circuit, the court also relied on regulations promulgated by the Department of Justice (DOJ) "listing correctional facilities . . . as covered entities," as confirmation that the Rehabilitation Act and the ADA apply to state and locally-operated [prisons]." *Id.* at 172.

The court recognized that we had questioned in *Torcasio* the applicability of the ADA and the Rehabilitation Act to state ;prisons, but held that our analysis in that case was "seriously flawed." *Id.* According to *Yeskey*, our "extension of the clear statement rule was unwarranted [because] *Will, Atascadero,* and *Pennhurst*" — cases we cited in *Torcasio* as support for

applying the clear statement rule — "all involved instances in which there had been no express waiver or abrogation of the state's traditional immunity from suit." *Id.* In contrast, the court opined, the ADA and the Rehabilitation Act each contain an express abrogation of the Eleventh Amendment immunity of the States. *See id.* At 172-73 (citing 42 U.S.C.A. § 2000d-7(a)(1) (West 1994) (Rehabilitation Act); 42 U.S.C.A. § 12202 (West 1995) (ADA)).

The court implicitly recognized that the clear statement rule has been applied by the Supreme Court in cases where there was an express abrogation by Congress of the States' Eleventh Amendment immunity, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452 (1991) (holding that Missouri's mandagtory retirement requirement for state judges does not violate the Age Discrimination in Employment Act (ADEA)), and explicitly conceded that whenever "'Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute,'" *Yeskey*, 118 F.3d at 173 (quoting *Gregory*, 501 U.S. at 460), and that "prison administration [is] a 'core' state function," *id.* Notwithstanding these concessions, the court determined that the clear statement rule was inapplicable because, it concluded, Congress made clear in the language of the statutes that the ADA and the Rehabilitation Act apply to state prisons. *See id.*

The court acknowledged the looming "specter of federal court management of state prisons," resulting from application of the ADA and the Rehabilitation Act. *Id.* at 174; *see also id.* ("'[I]f the ADA applies to routine prison decisions, it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments, and to interfere with security procedures.'" (quoting Appellees' Br. At 15)). The court held, however, that

such concerns "do not override our conclusion that the ADA applies to prisons." *Id.* The court concluded: "[O]ur holding does not dispose of the controversial and difficult question [of] whether principles of deference to the decisions of prison officials in the context of constitutional law apply to statutory rights. We are not sure of the answer, and need not address that question now." *Id.* at 174-75 (citation and footnote omitted) (citing *Turner v. Safley*, 482 U.S. at 78). Thus, the court — like the Seventh Circuit in *Crawford* — declind to outlin the meaning of "reasonable accommodation" and "undue burden" under the ADA and the Rehabilitation Act in the prison context.

We remain firmly convinced that *Torcasio*'s explication of the clear statement principle and its application to the issue before us is both thorough and persuasive. *Torcasio* accurately outlind the parameters of the clear statement rule, stating that Congress must speak clearly in the statutory text when it intends to alter the traditional balance between the states and the federal government. *See* 57 F.3d at 1346. *Torcasio* also forcefully explained why the operation of state prisons is an area traditionally reserved to the states, and persuasively outlined in the sundry ambiguities in the statutory text which reveal that Congress failed to speak with unmistakable clarity on the issue of whether the Rehabilitation Act would have serious implications for the management of state prisons, in matters ranging from cell construction and modification, to inmate assignment, to scheduling, to security problems." 57 F.3d at 1346.

Our conclusion today that *Torcasio* was rightly decided, and that the Rehabilitation Act and the ADA do not apply to state prisons, is fortified by the interpretative analyses undertaken by the Ninth, Seventh, and Third Circuits in determining that the statutes have application in the state prison context, by the extraordinary lengths to which those circuits

have gone to acknowledge the chaos that will likely result from their holdings, and, in some cases, by the efforts they have made to limit the reach of their holdings. Most importantly, each of the Circuits holding that the Rehabilitation Act and the ADA apply to state prisons has gone to extraordinary lengths to acknowledge the chaos likely to result from their holdings. *See, e.g., Crawford*, 115 F.3d at 487 (noting "security concerns"); *Yeskey* 118 F.3d at 174 (acknowledging the "specter of federal court management of state prisons," and that "it is not unfathomable that courts will be used to reconstruct cells and prison space, to alter scheduling of inmate movements and assignments, and to interfere with security procedures" (quotation omitted)). In addition, the Ninth Circuit has gone out of its way to limit the reach of its holding that the statutes apply to state prisons. Specifically, while purporting to adhere to the text of the Rehabilitation Act and the ADA in determining that the statutes apply to state prisons, the Ninth Circuit — when forced to outline the meaning of "reasonable accommodation" and "undue burden" in the state prison context — has created extratextually, out of whole cloth, a statutory standard by engrafting the constitutional standard onto the statute, *see Gates*, 39 F.3d at 1447; for their part, the Seventh and Third Circuits have transformed themselves into contortionists attempting to avoid the necessary consequences of their holdings by declining to outline the meaning of "reasonable accommodation" and "undue burden" in the prison context, *see Crawford*, 115 F.3d at 487; *Yeskey*, 118 F.3d at 174-75. Unlike the Ninth, Seventh, and Third Circuits, we declin to engage in such interpretive gymnastics.

Accordingly, we hereby reaffirm that state prisons cannot be subjected to the ADA and the Rehabilitation Act unless there has been a clear and plain statement from Congress permitting federal intrusion into this are of historic state control. Furthermore, we conclude, as we strongly suggested in *Torcasio*,

that Congress has made no such clear statement regarding the application of the ADA and the Rehabilitation Act to state prisons. Therefore, we hold that state prisons are not subject to the ADA and the Rehabilitation Act.

C.

Not surprisingly, the prisoners and the Justice Department contend that *Torcasio* was wrongly decided. (Appellants' Br. at 23-25; DOJ Br. at 12-21.) First they argue that courts are to apply the clear statement rule only where statutory intent is ambiguous, *see Gregory*, 501 U.S. at 470, and that in this case "there is no ambiguity as to the statute's [sic] coverage of state prisons and prisoners." (Appellants' Br. At 25; *accord* DOJ Br. at 17.) According to the prisoners and the Justice Department, the *Torcasio* court's determination that it is "far from clear on the face of the laws" that Congress intended the statutes to apply to state priosns, *see* 57 F.3d at 1347, was simply erroneous. (Appellants' Br. at 23; DOJ Br. at 19.)

Relying on the broad, non-specific language of the statutes, the prisoners and the Justice Department argue that "the operations of state or local correctional facilities fall quite naturally within the terms 'programs' and 'activities.'" (DOJ Br. At 19; *accord* Appellants' Br. at 23.) We cannot agree. "[I]ncarceration, which requires the provision of a place to sleep, is not a 'program' or 'activity.'" *Bryant*, 84 F.3d at 249; *accord White*, 82 F.3d at 367 (holding that prisons do not sponsor "programs" or "activities" as those terms are ordinarily understood (adopting *Williams*, 926 F.2d at 997)); *Torcasio*, 57 F.3d at 1347 (same). The operations of state prisons fall naturally within the statutory terms "services," "programs," and "activities" only when particular services, activities, or programs are divorced from the context of correctional facilities. A family outing to the local public library, for example, falls quite

naturally within the common understanding of the meaning of "activity," *see Crawford*, 115 F.3d at 483. The use of a court-mandated prison law library by an individual incarcerated by a state, *see Bounds v. Smith*, 430 U.S. 817 (1997) (requiring prison authorities to provide prisoners with adequate law libraries), on the other hand, does not fall naturally within the ambit of that statutory term. As we stated in *Torcasio*, "most prison officials would be surprised to learn that they were" required by the ADA and the Rehabilitation Act to provide "'services,' 'programs,' or 'activities' as those terms are ordinarily understood." 57 F.3d at 1347.

We also concluded in *Torcasio* that "[t]he terms 'eligible' and 'participate' imply voluntariness on the part of an applicant who seeks a benefit from the state; they do not bring to mind prisoners who are being held against their will." *Id.* The prisoners and the Justice Department contend that our suggestion that the ADA and the Rehabilitation Act are inapplicable to programs and services that are obligatory in nature was incorrect because "the terms 'eligible' and 'participate' do not, as *Torcasio* stated, 'imply voluntariness' or mandate that an individual seek out or request a service to be covered." (DOJ Br. at 20 (citation omitted) (quoting *Torcasio*, 57 F.3d at 1347); *accord* Appellants' Br. at 23-24.) The provision by a state government of some compulsory programs and services may be subject to the requirements of the ADA and the Rehabilitation Act, notwithstanding the fact that such programs or services are in some sense "involuntary." Nevertheless, we are satisfied that our conclusion in *Torcasio* was correct: The statutory language does not bring to mind prisoners being held against their will, and therefore neither the ADA nor the Rehabilitation Act state with unmistakable clarity that the statutes apply to state prisons. *See* 57 F.3d at 1346-47.

Furthermore, the introductory language of both statutes

reveals that Congress did not clearly express an intention to make the statutes applicable to state prisons and prisoners. Under the ADA, Congress determined that "the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C.A. § 12101(a)(8) (West 1995). Achieving these goals, Congress found, would provide "people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our *free society* is justifiably famous." 42 U.S.C.A. § 12101(a)(9) (emphasis added). This introductory language in no way evinces an intention by Congress to make the ADA applicable to state prisons. As Appellees put it, "[w]ithout question, a prison is hardly such a free society." (Appellees Br. At 28.)

Similarly, the Rehabilitation Act's introductory language does not manifest an intention by Congress to make the Rehabilitation Act applicable to state prisons. The introductory section of the Rehabilitation Act states:

> (3) disability is a natural part of the human experience and in no way diminishes the right of indivduals to —
>
> (A) live independently;
>
> (B) enjoy self-determination;
>
> (C) make choices;
>
> (D) contribute to society;
>
> (E) pursue meaningful careers; and

> (F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society.

29 U.S.C.A. § 701(a)(3) (West Supp 1997). This introductory language, like that of the ADA, does not even hint at an intention by Congress to make the ADA applicable to state prisons. Indeed, the contrary inference — that Congress never contemplated that the Rehabilitation Act would apply to state prisons — is readily drawn. Disabled and nondisabled prisoners alike, because of their inability to live in a free society, neither "live independently," "enjoy self-determination," nor "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society." *Cf. Crawford*, 115 F.3d at 486 (conceding that "[i]nsofar as the Act is intended to 'mainstream' disabled people, its application to prisoners might produce some anomalies" (citation omitted)).

Congress simply has not spoken through the ADA or the Rehabilitation Act with anywhere near the clarity and the degree of specificity required for us to conclude that state prisons are subject to the statutes. Neither the prisoners nor the Department of Justice are able to direct us to statutory language or legislative history to the contrary. Indeed, the legislative history of both the ADA and the Rehabilitation Act is silent on the applicability of the statutes to state prisons.[7] In *Yeskey*, 118 F.3d 168, the Third Circuit determined that this congressional silence constituted

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[7]The dissent considers our statement that the legislative history of the statutes is silent on the applicability to state prisons to be a concession "that the legislative histories of the Rehabilitation Act and the ADA *do not forbid* application [of the statutes] to state prisons." *Post* at 70 (emphasis added). To the contrary, congressional silence over whether the Rehabilitation Act and the ADA apply to state prisons buttresses our conclusion that Congress has failed to state with unmistakable clarity that the statutes apply in the state prison context.

tacit approval of its conclusion that the ADA and the Rehabilitation Act "apply to state and local correctional facilities." *Id.* at 174. The court stated:

> [T]he legislative history does not inveigh against this conclusion. When the ADA was enacted in 1990, the Rehabilitation Act had been law for seventeen years and a number of cases had held it applicable to prisons and prisoners, yet Congress did not amend that Act or alter any language so as to extirpate those interpretations.

Id. at 174 n.7; *accord Crawford*, 115 F.3d at 484 (noting that "[w]hen the [ADA] was passed in 1990, the Rehabilitation Act . . . had been on the books for 17 years, and there were several cases holding that Act applicable to prisons and prisoners" (citing *Bonner v. Lewis*, 857 F.2d 559 (9th Cir. 1988); *Harris v. Thigpen*, 727 F. Supp. 1564, 1582-83 (M.D. Ala. 1990), *aff'd*, 941 F.2d 1495 (11th Cir. 1991); *Sites v. McKenzie*, 423 F. Supp. 1190, 1197 (N.D. W. Va. 1976))). Congressional silence in the ADA's legislative history regarding the applicability of the statute to state prisons, however, provides no basis for inferring congressional approval of one Circuit's (and two district courts') interpretation of the Act. Indeed, "[i]t is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law." *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also EEOC v. Gilbarco, Inc.*, 615 F.2d 985, 1013-15 (4th Cir. 1980) (Murnaghan, J., concurring in part and dissenting in part) (questioning soundness of proposition that congressional silence or inaction in reenacting a statute constitutes approval of prior judicial interpretation of the statute). As the *Crawford* court acknowledged, "Congress may not have been aware of the cases interpreting that Act." *Crawford*, 115 F.3d at 484. Accordingly, we can conclude only that Congress did not contemplate, let

alone approve, the pre-ADA application of the Rehabilitation Act to state prisons and the implications such application would have for the sovereignty of the States. *Cf. Virginia Dep't of Education v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997 (en banc) (applying clear statement rule and stating that not "a single word from the statute or from the legislative history of [the Individuals with Disabilities Education Act (IDEA)] evidence[s] that Congress even considered" requiring states to continue providing educational services to disabled children after their expulsion for misconduct unrelated to their disabilities).[8]

Appellees do not argue that had Congress expressed with unmistakable clarity an intention to regulate state correctional facilities through the ADA and the Rehabilitation Act, it would nonetheless have been without the authority to do so. Presumably, Appellees decline to make such an argument in light of *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 547-56 (1985) (leaving primarily to political process the protection of the States against intrusive exercises of Congress'

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[8]The dissent suggests that our reliance on *Virginia Dep't of Education v. Riley*, 106 F.3d 559 (4th Cir. 1997) (en banc), is questionable because subsequent to our decision in that case, Congress amended the Individuals With Disabilities Education Act (IDEA) to ensure, contrary to our holding in *Riley*, that states provide educational services to disabled children expelled from school for misconduct unrelated to their disabilities. *See Post* at 73 n.*. Congress' subsequent amendment, however, in no way undermines the reasoning of *Riley*, nor does it render our reliance on *Riley* "questionable." In *Riley*, we held that § 1412 of the IDEA, *see* 20 U.S.C.A. § 1412 (West Supp. 1997), was ambiguous, applied the clear statement rule, and held that absent a clearer statement from Congress, the federal government could not require states to provide educational services to disabled students expelled for misconduct wholly unrelated to their disabilities. *See Riley*, 106 F.3d at 561. Contrary to the dissent's suggestion, Congress' subsequent "clarification" of the IDEA only validates our conclusion in *Riley* that the statutory language was ambiguous, and that therefore the clear statement rule should be applied.

Commerce Clause powers). Were we operating pre-*Garcia*, however, Congress' authority to regulate state prisons in the manner contended by the prisoners and the Justice Department would be doubtful. *See National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) ("Congress may not exercise [Commerce Clause] power so as to force directly upon the States its choices as to how essential decision regarding the conduct of integral governmental functions are to be made."), *overruled by Garcia*, 469 U.S. at 528. *Garcia* notwithstanding, whether Congress even has the authority to regulate state prisons is not readily apparent. *See Garcia*, 469 U.S. at 580 (Rehnquist, J., dissenting) (stating that principle outlined in *National League of Cities* "will, I am confident, in time again command the support of a majority of this Court"); *see also Gregory*, 501 U.S. at 464 (noting *Garcia*'s constraint on "our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause," and stating that "[a]pplication of the plain statement rule thus may avoid a potential constitutional problem"). This is true even though Congress, in addition to relying on its Commerce Clause powers, invoked its authority to enforce the Fourteenth Amendment when it enacted the ADA, *see* 42 U.S.C.A. § 12101(b)(4) (West 1995). Congress' enforcement power under the Fourteenth Amendment is not unlimited. *See City of Boerne v. Flores*, 117 S. Ct. 2157, 2159 (1997) (holding that the Religious Freedom Restoration Act (RFRA) is "a considerable congressional intrusion into the States' traditional prerogatives," and that Congress exceeded its power under the Fourteenth Amendment in enacting the statute); *Gregory*, 501 U.S. at 469 ("[T]he Fourteenth Amendment does not override all principles of federalism."); *but cf. Clark v. California*, No. 96-16952, 1997 WL 525518, *2 (9th Cir. Aug. 27, 1997) (holding that "both the ADA and the Rehabilitation Act were validly enacted under the Fourteenth Amendment"); *Crawford*, 115 F.3d at 487 (holding "that the ADA is [within] the scope of section 5" of the Fourteenth Amendment).

Second, in addition to arguing that the clear statement rule should not apply because the statutes are unambiguous, the prisoners contend that the clear statement rule may be applied only where "the proposed application of federal law would infringe upon a core function going to the 'heart of representative government, *e.g.*, 'the authority of the people of the States to determine the qualifications of their most important government officials .'" (Appellants' Br. At 24 (quoting *Gregory*, 501 U.S. at 463).) Put differently, the prisoners contend that Congress is required to make a clear statement of its intention to alter the usual constitutional balance between the States and the Federal Government *only* when federal legislation implicates the functioning of democratic processes within a state. The Supreme Court, however, has not confined the clear statement rule so narrowly. *See, e.g. Will*, 491 U.S. at 65 (describing the clear statement rule as an "ordinary rule of statutory construction" to be applied in analyzing statutes altering the "usual constitutional balance between the States and the Federal Government"). Indeed, the Supreme Court has held that the clear statement rule is to be invoked "[i]n traditionally sensitive areas, such as legislation affecting the federal balance." *United States v. Bass*, 404 U.S. 336, 349 (1971). As we have stated, the management of state prisons is just such a traditionally sensitive area, and application of the ADA and the Rehabilitation Act to state prisons would unquestionably affect the federal balance. *See Torasio*, 57 F.3d at 1345 (citing *Procunier*, 416 U.S. at 412; *Preiser*, 411 U.S. at 491-92); *cf. Riley*, 106 F.3d at 566 (holding that "[i]nsistence upon a clear, unambiguous, statutory expression of congressional intent to condition the States' receipt of federal funds in a particular manner is especially important where . . . the claimed condition requires the surrender of one of . . . the powers or functions reserved to the States by the Tenth Amendment").

The Justice Department argues that the "extension of the

clear statement rule [in *Torcasio*] was unwarranted . . . [because] both Section 504 and Title II of the ADA contain an unequivocal expression of Congressional intent to overturn the constitutionally guaranteed immunity of the several states." (DOJ Br. At 16 (quotation omitted) (citing 42 U.S.C.A. § 2000d-7(a)(1) (West 1994); 42 U.S.C.A. § 12202 (West 1995))); *accord Yeskey*, 118 F.3d at 172-73. We agree that Congress' epxress abrogation in the ADA and the Rehabilitation Act of the Eleventh Amendment immunity of the States suggests that Congress intended for those statutes to apply to states generally.[9] However, "a clear statement is required not simply in determining whether a statute applies to the States, but also in determining whether the statute applies in the particular manner claimed." *Riley*, 106 F.3d at 568 (citing *Gregory*, 501 U.S. at 460-70).

Gregory is closely analogous. *See* 501 U.S. at 452. In *Gregory*, the Supreme Court held that the Age Discrimination in Employment Act (ADEA), a statute in which Congress expressly abrogated the States' Eleventh Amendment immunity, *see* 29 U.S.C.A. § 630(b)(2) (West 1985), did not apply to state judges because the statute did not unambiguously reveal that Congress intended such a result. Like the ADEA, the ADA and the Rehabilitation Act are statutes in which Congress has expressly abrogated the Eleventh Amendment immunity of the States. *See* 42 U.S.C.A. § 2000d-7(a)(1); 42 U.S.C.A. § 12202. This express abrogation suggests that Congress intended the statutes to apply to states generally. The applicability of the statutes to

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[9]Although Congress is without the authority to abrogate the Eleventh Amendment immunity of the States pursuant to its Commerce power, it may abrogate the Eleventh Amendment immunity of the States pursuant to its enforcement power under § 5 of the Fourteenth Amendment. *See Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114, 1125 (1996); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 453 (1976).

state prisons and prisoners, however, like the applicability of the ADEA to state judges, was simply not addressed by Congress in the language of the statutes. Thus, in *Gregory* the Supreme Court determined that it was ambiguous whether Congress intended the ADEA to apply to state judges. *See Gregory*, 501 U.S. at 467. The language of the statute, the court held, "is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges." *Id.* Here, for the same reasons, because the statutory language is so broad, we cannot conclude that Congress intended that the statutes apply to state prisons and prisoners. As in *Gregory*, the breadth of the statutory language renders it ambiguous. We therefore decline to attribute to Congress an intent to intrude on a core state function in the face of statutory ambiguity. *Cf. Gregory*, 501 U.S. at 464-71; *see also Torcasio*, 57 F.3d at 1346.[10]

In *Gregory*, the Supreme Court determined that it could not "conclude that the statute plainly covers appointed state judges," 501 U.S. at 467, because of the solicitude owed to the rights of the States in our federalist system. The court stated:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection

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[10]The dissent claims that our holding today means that "Congress cannot make the Rehabilitation Act and the ADA applicable to state prisons or to other areas traditionally reserved to the states unless it separately lists each state agency that the statute apply to in statutory text." *Post* at 72. Citing *Gregory v. Ashcroft*, 501 U.S. 452 (1991), the dissent contends that "[t]he Supreme Court . . . has expressly rejected such a requirement." *Post* at 72. We do not hold, however, that Congress must list each state agency to which statutes apply to make the statutes applicable to specific state agencies. We hold only, as the Supreme Court did in *Gregory*, that Congress did not clearly express in either the Rehabilitation Act or the ADA an intention to intrude on the core state function of managing state prisons.

> of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. "[T]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests."

Id. at 464 (quoting Laurence H. Tribe, *American Constitutional Law* § 6-25, at 480 (2nd ed. 1988)). The court went on to hold that Congress also must speak with unmistakable clarity when enacting intrusive legislation pursuant to its power under § 5 of the Fourteenth Amendment. *See id.* At 467-70. The court stated that "[b]ecause such legislation imposes congressional policy on a State involuntarily, and because it often intrudes on traditional state authority, we should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." *Id.* At 469 (quoting *Pennhurst*, 451 U.S. at 16). The case before us is indistinguishable from *Gregory*. Just as "it is at least ambiguous whether Congress intended that appointed judges . . . be included" within the scope of the ADEA, *id.* At 470, it is at *least* ambiguous whether Congress intended that the strictures of the ADA and the Rehabilitation Act apply to state prisons. Accordingly, as in *Gregory*, "[i]n the face of such ambiguity, we will not attribute to Congress an intent to intrude on state governmental functions regardless of whether Congress acted pursuant to its Commerce Clause powers or § 5 of the Fourteenth Amendment." *Id.*

Finally, both the prisoners and the Department of Justice contend that "even if this Court were to adhere to the view that it is ambiguous on the face of the statutes whether they apply to state prisons, any such ambiguity is definitely resolved by DOJ regulations." (Appellants' Br. At 26; *accord* DOJ Br. At 8-12.)

They argue that DOJ regulations applying the statutes to state prisons must be accorded "the greatest possible weight and deference in interpreting the statutes." (Appellants' Br. At 21; *accord* DOJ Br. At 8 (citing *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984)).) The regulations promulgated under § 504 of the Rehabilitation Act define "program" to mean "the operations of the agency or organizational unit of government receiving or substantially benefiting from the Federal assistance awarded, *e.g.*, a police department or department of corrections." 28. C.F.R. § 42.540(h) (1996). The regulations promulgated under Title II of the ADA designate the Department of Justice as the agency responsible for coordinating the compliance activities of public entities that administer "programs, services, and regulatory activities relating to law enforcement, public safety, and the administration of justice, including courts and correctional institutions." 28 C.F.R. § 35.190(B)(6) (1996). The preamble to the ADA regulations also states that "[a] public entity is not . . . required to provide attendant care, or assistance in toileting, eating, or dressing to individuals with disabilities, except . . . where the individual is an inmate of a custodial or correctional institution." 28 C.F.R. pt. 35, app. A, at 468 (1996).

The regulations promulgated under the Rehabilitation Act adopt the Uniform Federal Accessibility Standards (UFAS), which apply to federal agencies and entities receiving federal financial assistance. *See* 28 C.F.R. § 42.522(b) (1996). UFAS lists jails, prisons, reformatories, and "[o]ther detention or correctional facilities" as institutions to which UFAS standards apply. *See* 41 C.F.R. subpt. 101-19.6, app. A, at 150 (1996). UFAS standards regulate in minute detail the construction and maintenance of buildings of federal agencies and institutions receiving federal funding. UFAS standards consume 87 pages in the Code of Federal Regulations, *see* 41 C.F.R. subpt. 1010-19.6, app.A, at 140-227, and include requirements for, *inter alia*,

the construction, modification, or installation of ground and floor surfaces, parking and passenger loading zones, curb ramps, ramps, stairs, elevators, platform lifts, windows, doors, entrances, drinking fountains and water coolers, water closets, toilet stalls, urinals, lavatories and mirrors, bathtubs, showre stalls, toilet rooms, sinks, handrails, grab bars, tub and shower seats, alarms, telephones, assembly areas, and dwelling units, *see id.*

The regulations promulgated under the ADA permit covered entities building new or altering existing facilities to follow either UFAS or the ADA Accessibility Guidelines for Buildings and Facilities (ADAAG). *See* 28 C.F.R. § 35.151(c) (1996). Amendments to the ADAAG, adopted as an Interim Final Rule, effective December 20, 1994, by the Architectural & Transportation Barriers Compliance Board, include specific accessibility guidelines for "detention and correctional facilities." 59 Fed. Reg. 31,676, 31,770-72 (1994); *see also* 36 C.F.R. pt. 1191, app. A, at 782-84 (1996). The Department of Justice has proposed adoption of the interim final rule. *See* 59 Fed. Reg. At 31,808. Like the byzantine UFAS standards, ADAAG standards intricately regulate the constoruction or modification of existing covered facilities and consume 129 pages of th eCode of Federal Regulations. *See* 36 C.F.R. pt. 1191, app. A, at 663-792. ADAAG requirements specific to "detention and correctional facilities" address, *inter alia*, specifications for prison visiting areas, medical care facilities and restrooms; the "dispersion" of "accessible cells" within the correctional facility; accommodations for inmates with hearing impairments; and the appropriate height of ;prison beds. *See id.* at 782-84.

The prisoners and the Justice Department contend that in the event of ambiguity over whether the statutes apply to state prisons we must defer to the Justice Department's interpretation

of the statutes as set forth in the regulations. They make this contention "as if we were interpreting a statute which has no implications for the balance of power between the Federal Government and the States." *Riley*, 106 F.3d at 567. The implications for the balance of power between the Federal Government and the States, however, are enormous. The intrusiveness of regulations (especially the UFAS and ADAAG standards) makes this apparent. Where application of an ambiguous federal statute would "upset the usual constitutioal balance of federal and state powers," *Gregory*, 501 U.S. at 460, as in this case, we will not defer to an administrative agency's interpretation of the statute, however reasonable, *see Riley*, 106 F.3d at 567. The argument to the contrary, put forth by both the prisoners and the Department of Justice, has been soundly rejected by the Supreme Court. *See Gregory*, 501 U.S. at 493 (Blackmun, J., dissenting) (arguing unsuccessfully that *Chevron* deference, rather than clear statement rule, was appropriate).

Finally, if nothing else convinced us that the ADA and the Rehabilitation Act do not apply to state prisons, the Ninth Circuit's decision in *Gates* would. *See* 39 F.3d at 1439. Bound by a previous decision holding that the Rehabilitation Act applies to state prisons, *see Bonner*, 857 F.2d at 559, the *Gates* court was forced to consider "how the Act is to be applied in a prison setting." *Gates*, 39 F.3d at 1446; *but cf. Yeskey*, 118 F.3d at 174-75 & n.8 (applying ADA and Rehabilitation Act to state prisons but declining to determine appropriate standard for reviewing claims brought under the statutes); *Crawford*, 115 F.3d at 483, 487 (same). Recognizing that "[t]he Act was not designed to deal specifically with the prison environment," and that "[t]here is no indication that Congress intended the Act to apply to prison facilities irrespective of the considerations of the reasonable requirements of effective prison administration," the court determined that "[i]t is highly doubtful that Congress intended a more stringent application of the prisoners' statutory

rights created by the Act than it would the prisoners' constitutional rights." *Gates*, 39 F.3d at 1446-47. Thus, the court deemed — out of whole cloth — "the applicable standard for the review of the Act's statutory rights in a prison setting to be equivalent to the review of constitutional rights in a prison setting." *Id.* At 1447 (citing *Turner v. Safley*, 482 U.S. 78 (1987)).[11] As a result, although the Ninth Circuit has applied the Rehabilitation Act (and the ADA, *see Duffy*, 98 F.3d at 447) to state prisons, it has effectively eviscerated the statutes in the prison context. *See* Ira P. Robbins, *George Bush's America Meets Dante's Inferno: The Americans with Disabilities Act in Prison*, 15 Yale L. & Pol'y Rev. 49, 96 & n.249 (1996) (citing William C. Collins, *Use of* Turner *Test Deferring to Institutions' Security Concerns May Sharply Limit Inmates' ADA Protection*, Correctional L. Rep. At 65 (Feb. 1995)); *see also Bullock v. Gomez*, 929 F. Supp. 1299, 1306-08 (C.D. Cal. 1996) (analyzing inmate's ADA and Rehabilitation Act claims under *Turner* standard).

The Ninth Circuit's decision in *Gates* reveals the futility of applying the statutes in the prison context. *Gates* makes clear that Congress did not contemplate that the statutory requirement that "reasonable accommodation" be made for disabled individuals (unless doing so would impose an 'undue burden") would apply to state correctional facilities. *See Gates*, 39 F.3d 1446-47. *Gates* also makes clear that application of the statutory mandate (not to mention compliance with the onerous regulations) is, in fact, unworkable in the prison context. *See id.*

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[11] Although purporting in *Bonner* to adhere to the statutory text in determining that the Rehabilitation Act applies to state prisons, *see Bonner v. Lewis*, 857 F.2d 559, 562 (9th Cir. 1988), the Ninth Circuit's determination in *Gates* that the constitutional standard applies to Rehabilitation Act claims was entirely extratextual, *see Gates v. Rowland*, 39 F.3d 1439, 1447 (9th Cir. 1994).

For these reasons, *Gates* convinces us of the correctness of our determination that the ADA and the Rehabilitation Act do not apply to state prisons. Because the statutes do not apply to state prisons and prisoners, we affirm the district court's grant of summary judgment for Appellees on the prisoners' ADA and Rehabilitation Act claims.[12]

III.

After the district court granted summary judgment for Appellees on the prisoners' ADA and Rehabilitation Act claims, a hearing was held on Appellees' motion for summary judgment on the Eighth Amendment claims of prisoners Amos, William Smith, Michael Smith, Megginson, Ralph, and Prymerman, brought under 42 U.S.C.A. § 1983 (West Supp. 1997). At the close of the hearing, the district court ordered that the prisoners' constitutional claims be dismissed. Thereafter, the court issued an amended final order granting Appellees' motion for summary judgment "as to all claims." (J.A. at 136).

The six prisoners contend that the district court erred in granting summary judgment on their Eighth Amendment claims. They argue that they presented evidence of inadequate medical care sufficient to withstand summary judgment. According to the prisoners, the evidence viewed in the light most favorable to them establishes that Appellees Lanham, the Commissioner of the Maryland Division of Corrections, and Galley, the Warden of RCI, knew about but failed to take appropriate measures to remedy serious risks to their health.

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[12]Given our holding that the ADA and the Rehabilitation Act do not apply to state prisons and prisoners, we need not address the prisoners' claim that the district court erred in holding that Appellees are entitled to qualified immunity from damages under the statutes.

We review a district court's grant of summary judgment de novo. *See Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is proper only if no genuine issue of material fact is in dispute. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

A.

The prisoners sued MDPSCS; RCI; Lanham, in his official capacity as the Commissioner of the Maryland Division of Corrections; and Galley, in his official capacity as the Warden of RCI. Lanham and Galley contend that

> the only Appellees in this case are two state institutions and two individuals in their official capacity, *See* Amended Complaint caption. J.A. 29. These Appellees are immune from any suit for monetary damages under § 1983. *See Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). For this reason alone, defendants are entitled to summary judgment on the Eighth Amendment claims.

(Appellees' Br. At 44; *see also* DOJ Br. At 13 (noting that "the plaintiffs in this case have not sued any of the defendants in their individual capacities").) The prisoners concede that they "failed to specify in their Complaint for damages that the defendants were named 'in their individual capacities,'" but argue that "the court should look to the totality of the Complaint as well as the course of proceedings to determine whether the defendants received sufficient notice of potential exposure to liability."

(Appellants' Br. at 45 n.39.)

In *Biggs v. Meadows*, 66 F.3d 56 (4th Cir. 1995), we held "that a plaintiff need not plead expressly the capacity in which he is suing a defendant in order to state a cause of action under § 1983." *Biggs*, 66 F.3d at 59 (citing *Hafer v. Melo*, 502 U.S. 21, 23 (1991)). We determined, however, that "a substantial majority" of the Circuits look "to the substance of the plaintiff's claim, the relief sought, and the course of proceedings to determine the nature of a § 1983 suit when a plaintif fails to allege capacity." *Id.* Because we found this view to be persuasive, *see id.* At 60, we adopted it. We stated: "[W]hen a plaintiff does not allege capacity specifically, the court must examine the nature of the plaintiff's claims, the relief sought, and the course of proceedings to determine whether a state official is being used in a personal capacity." *Id.* At 61.

The *Biggs* rule does not apply to the case before us. By the rule's own terms, it applies only "when a plaintiff does not allege capacity specifically." *Id.*; *see also id.* at 59 (noting that "when a plaintiff fails to allege capacity," the majority of Circuits look to the substance of the complaint). Unlike the prisoner in *Biggs*, whose complaint was silent on the issue of the defendants' capacity, the prisoners here alleged capacity specifically by expressly pleading that Lanham and Galley were being sued in their official capacities. Indeed, they concede as much in their briefing on appeal. Furthermore, unlike the prisoner in *Biggs*, the prisoners in the instant case are not proceeding pro se. Thus, the Supreme Court's directive that we construe pro se complaints liberally, *see Boag v. MacDougall*, 454 U.S. 364, 365 (1982) (per curiam); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972), is inapposite. The prisoners in this case have been represented from the outset of this litigation by several public interest law firms, including the American Civil Liberties Union of Maryland (ACLU), an organization known

for its litigation prowess. The relaxed pleading requirements applicable to pro se complaints, therefore, are simply not applicable here. *See, e.g., White v. White*, 886 F.2d 721, 722-23 (4th Cir. 1989) (holding that pro se complaints, however inartfully pleaded, must be held to "less stringent standards than pleadings drafted by attorneys"); *Boyce v. Alizaduh*, 595 F.2d 948, 951 (4th Cir. 1979) (same). Accordingly, as is revealed on the face of the complaint, the prisoners brought suit against Lanham and Galley in their official capacities only. As such, Lanham and alley, like MDPSCS and RCI, are immune from suit for monetary damages under § 1983. *See Will*, 491 U.S. at 71 (holding that "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself" which is barred by the Eleventh Amendment); *see also Biggs*, 66 F.3d at 60. The district court therefore properly granted Appellees' motion for summary judgment on the prisoners' constitutional claims.

B.

To the extent the prisoners seek injunctive relief against Appellees under § 1983,[13] the district court properly granted summary judgment. No reasonable jury could conclude that Lanham and Gallehy violated the prisoners' constitutional rights under the Eighth Amendment. *See Anderson*, 477 U.S. at 248 (holding that summary judgment is appropriate "if the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party"). The Eighth Amendment provides:

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[13]State officials sued in their official capacities for injunctive relief are persons (and therefore amenable to suit) "under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will v. Michigan Dep't of State P* State officials sued in their official capacities for injunctive relief are *olice*, 491 U.S. 58, 71 n.10 (1989) (quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985)).

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.[14] To establish the imposition of cruel and unusual punishment, a prisoner must prove two elements: (1) that objectively the deprivation of a basic human need was "sufficiently serious"; and (2) that subjectively the prison officials acted with a sufficiently culpable state of mind. *See Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (holding that Eighth Amendment claims turn on an "objective component . . . (Was the deprivation sufficiently serious?), and [a] . . . subjective component (Did the officials act with a sufficiently culpable state of mind?)"); *see also Shakka v. Smith*, 71 F.3d 162, 166 (4th Cir. 1995); *Strickler v. Watres*, 989 F.2d 1375, 1379 (4th Cir. 1993).

In the context of an Eighth Amendment claim based on a deprivation of medical attention, the objective component "is satisfied only if the medical need of the prisoner is 'serious.'" *Shakka*, 71 F.3d at 166 (quoting *Hudson v. McMillian*, 503 U.S. 1, 9 (1992)). The medical need of the prisoner must be objectively serious "'[b]ecause society does not expect that prisoners will have unqualified access to health care.'" *Id.* (alteration in original) (quoting *Hudson*, 503 U.S. at 9). The subjective component of an Eighth Amendment claim alleging the deprivation of a serious medical need is satisfied by a showing of "deliberate indifference" by prison officials. *See Wilson*, 501 U.S. at 303 (holding that claims alleging inadequate medical care are subject to the "deliberate indifference" standard outlined in *Estelle v. Gamble*, 429 U.S. 97, 105-06 (1976)); *see also LaFaut v. Smith*, 834 F.2d 389, 391-92 (4th Cir. 1987). "[D]eliberate indifference entails something more than mere

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[14]The Eighth Amendment applies to the States through the Due Process Clause of the Fourteenth Amendment. *See Wilson v. Seiter*, 501 U.S. 294, 296-97 (1991).

negligence, . . . [but] is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Farmer v. Brennan*, 114 S. Ct. 1970, 1978 (1994). Thus, the "deliberate indifference" standard recognizes a constitutional violation where prison officials know of and disregard an objectively serious condition, medical need, or risk of harm. *See id.* at 1984 (holding that 'a prison official may be held liable under the Eighth Amendment . . . only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it").

We conclude that the evidence, viewed in the light most favorable to the prisoners, cannot support a finding that Lanham and Galley were deliberately indifferent to the prisoners' serious medical needs.[15] Thus, summary judgment for Appellees on the prisoners' claims for injunctive relief was properly granted. First, there is no evidence to suggest that Lanham or Galley acted with deliberate indifference to Appellant Granville Amos' need for pain medication. The record reveals that for a time in 1991, Amos (and other inmates) did not receive necessary medication in a timely fashion "due to the non-delivery by the Pharmacy." (J.A. at 888.) The record also shows that Amos filed several ARPs notifying Galley of the problem. Galley, however, took affirmative steps to ensure that Amos (and other inmates) received necessary medication on time. Each time Amos notified the Warden that he was not receiving his medication, Galley directed "the CMS Medical Provider to

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[15]We do not address the objective component of the Eighth Amendment analysis, *i.e.*, whether the prisoners' medical needs are sufficiently serious." Appellees apparently have conceded for purposes of this appeal that the prisoner's medical needs are sufficiently serious (or, more properly, have conceded that the evidence is sufficient to create genuine issue of material fact on this question).

insure [sic] that this does not reoccur." (J.A. at 872.) When the problem with Pharmacy services ;persisted, Galley secured a "new Pharmacy." (J.A. at 888.) Nothing in the record so much as suggests that Lanham or Galley ignored or postponed addressing Amos' medical needs "out of mere convenience or apathy." *LaFaut*, 834 F.2d at 394. To the contrary, the record shows that prison officials acted quickly to remedy the problem brought to their attention by Amos. Accordingly, we hold that a reasonable jury could not conclude that Lanham or Galley exhibited deliberate indifference to Amos' medical needs And that therefore the district court's grant of summary judgment in their favor on Amos' Eighth Amendment claim was appropriate. *See Anderson*, 477 U.S. at 248.

Further, there is no evidence, either direct or circumstantial, to suggest that Lanham or Galley had any knowledge of the medical needs of Appellants William Smith, Michael Smith, and Boris Prymerman. The record establishes that these prisoners failed to file ARPs informing the Warden of their medical needs. Accordingly, there is no evidence that Lanham or Galley knew of and deliberately ignored their medial needs that could support a finding of deliberate indifference.[16] *See Farmer*, 114 S. Ct. at 1979; *Shakka*, 71 F.3d at 167. Thus, no reasonable jury could conclude that Lanham or Galley exhibited deliberate indifference to the medical needs of Appellants William and Michael Smith and Boris Prymerman. *See Anderson*, 477 U.S. at 248.

Appellant Howard Megginson filed two ARPs informing

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[16]Moreover, none of these prisoners contended (or presented evidence to support a finding) that Lanham or Galley are liable in a supervisory capacity. *See Shakka v. Smith*, 71 F.3d 162, 167 n.4 (4th Cir. 1995); *Shaw v. Stroud*, 13 F.3d 791, 799 (4th Cir. 1994); *Miltier v. Beorn*, 896 F.2d 848, 854-55 (4th Cir. 1990).

the Warden of his recurring urinary tract infection. Thus, prison officials were aware of his medical need. Megginson failed, however, to produce evidence suggesting that Lanham or Galley was deliberately indifferent to his need for medical attention. Megginson himself stated, under oath, that after he filed ARPs, medical staff promptly responded and provided appropriate medical attention for this recurring urinary tract infection. As such, Megginson's Eighth amendment claim is meritless; the evidence "is so one-sided that [Appellees] must prevail as a matter of law." *Anderson*, 477 U.S. at 252.

Finally, like the other prisoners Appellant Gary Ralph failed to raise a genuine issue of material fact over whether Lanham or Galley were deliberately indifferent to his medical needs. In an affidavit, Ralph stated that he was "scheduled for surgery while in prison four different times but I have never been provided the recommended surgery on my back." (J.A. at 159.) The evidence shows, however, that by June 27, 1995, Ralph was no longer incarcerated at RCI.. As such, Ralph's prayer for declaratory and injunctive relief is moot. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) holding that because prisoner was transferred to another facility and was no longer subjected to the conditions about which he complained, his claim for injunctive relief was moot); *Taylor v. Rogers*. 781 F.2d 1047, 1048 n.1 (4th Cir. 1986) (holding that prisoner's transfer mooted a request for declaratory and injunctive relief).

Even if Ralph's prayer for injunctive relief is not moot, he failed to attach supporting documents to his affidavit, or to forecast any evidence whatsoever supporting his claim that back surgery had been scheduled on four occasions but never preformed. Contrary evidence in the record reveals that specialists "recommended conservative treatment for [Ralph's] lumbosacral disc disease," not surgery. (J.A. at 602.) To avoid

the entry of summary judgment, Ralph was required to demonstrate through "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits" that there was a genuine issue of material fact on each element on which he would carry the burden of proof at trial. *See* Fed. R. Civ. P. 56(c); *see also Celotex*, 477 U.S. at 322 ("[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial."). Ralph simply failed to carry this burden with respect to his allegation that he was deprived of necessary surgery. Even if Ralph were able to show that prison medical care providers scheduled but failed to preform necessary surgery, there is no evidence that Ralph filed ARPs apprising the Warden of the medical care providers' failure to provide the surgery. As a result, there is no evidence that Lanham or Galley knew of and deliberately ignored his allegedly serious need for back surgery that could support a finding of deliberate indifference. *See Farmer* 114 S. Ct. at 1979; *Shakka*, 71 F.3d at 167. If Ralph had been able to show that he was deprived of necessary surgery, he then may have had a colorable Eighth Amendment claim, not against Lanham and Galley, but against the prison medical care providers. *See West v. Atkins*, 487 U.S. 42, 54-56 (1988) (holding that private physicians employed by state to provide medical services to inmates act "under color of state law" within the meaning of § 1983); *Conner v. Donnelly*, 42 F.3d 220, 224 (4th Cir. 1994) (same); *cf. Richardson v. McKnight*, 117 S. Ct. 2100, 2108 (1997) (holding "that private prison guards, unlike those who work directly for the government, do not enjoy immunity from suit in a § 1983 case"). The private medical care

providers, however, are not parties to this suit.[17]

Ralph also stated in his affidavit that he began suffering severe back and leg pain in June 1995, and that at some undesignated time he filed ARPs with the Warden requesting medical attention. The failure of Galley to provide Ralph with medical attention after his transfer from RCI on June 27, 1995, however, cannot constitute deliberate indifference. *Cf. Farmer*, 114 S. Ct. at 1982-83 (characterizing deliberate indifference standard as "[a] prison official's duty under the Eighth Amendment" to the inmates in his care). As for Lanham, there is nothing in the record suggesting that he was aware of Ralph's back and leg pain. Moreover, the record reveals that Ralph received treatment at the University of Maryland Hospital after his transfer from RCI. We are satisfied that no reasonable jury could conclude that Lanham exhibited deliberate indifference to Ralph's medical needs. Accordingly, the district court did not err in granting summary judgment for Lanham and Galley on Ralph's Eighth Amendment claim. *See Anderson*, 477 U.S. at 248.

In sum, we find that Lanham and Galley acted

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[17]Even if the private medical care providers were party to this suit, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle v. Gamble*, 429 U.S. 97, 106 (1976):

> [The question whether an X-ray — or additional diagnostic techniques *or forms of treatment* — is indicated is a classic example of a matter for medical judgment. A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment. At most it is medical malpractice, and as such the proper forum is the state court . . . .

Id at 107 (emphasis added).

reasonably in ensuring that the prisoners received appropriate medical attention and treatment. Because "prison officials who act reasonable cannot be found liable under the Cruel and Unusual Punishments Clause," *Farmer*, 114 S. Ct. at 1983, either for monetary damages (if used in their personal capacities), or for equitable relief (if sued in their official capacities), we hold that the district court properly granted summary judgment for Appellees on the prisoners' Eighth Amendment claims.

IV.

For the foregoing reasons, we affirm the district cour's grant of summary judgment for appellees on the prisoners' statutory and constitutional claims.

AFFIRMED

MURNAGHAN, Circuit Judge, dissenting in part:

I respectfully dissent in part. I disagree with Part II of the majority's opinion, which holds that section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. § 794 (West Supp. 1997), and Title II of the Americans with Disabilities Act (the "ADA"), 42 U.S.C.A. §§ 12131-12165 (West 1995 & Supp. 1997), do not apply to state prisons. Both statutes explicitly state in unambiguous terms that they apply to all of the operations of every stat government agency, department, and instrumentality. State correctional departments, and prisons unquestionably fall within that statutory language. Accordingly, I would reverse the district court's grant of summary judgment to the Appellees on the Rehabilitation Act and ADA claims.

I.

The district court granted summary judgment to the appellees on the Rehabilitation Act and ADA claims on two grounds. First, the court relied on *dicta* in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995) *cert. denied*, 116 S. Ct. 772 (1996), and held that the Rehabilitation Act and the ADA do not apply to state prisons. Second, the court held that even if the statutes do apply to state prisons, qualified immunity would bar the Appellants' claim for monetary damages. I would reverse the district court on both grounds. I address each argument in turn below.

A.

As the district court and the majority opinion correctly note, we have not previously decided whether the Rehabilitation Act and the ADA apply to state prisons. Although *Torcasio* involved similar Rehabilitation Act and ADA claims by a state prisoner, we ruled in favor of the prison officials only on the grounds of qualified immunity. We held that qualified immunity barred the prisoner's claims because it was not clearly established at the time of the alleged violations that the ADA and the Rehabilitation Act applied to state prisons. *See Torcasio*, 57 F.3d at 1343-52. We did not address the question at issue in the instant case, namely, whether the Rehabilitation Act and the ADA do not apply to state prisons. That question presents an issue of first impression in the Fourth Circuit.

In order to answer that question, we must begin by examining the language of the statutes themselves. *See Estate of Cowart v. Nicklos Drilling co.*, 505 U.S. 469, 475 (1992). When Congress uses unambiguous terms, we may not inquire beyond the statutory language. *Id.* The Supreme Court has held:

> [I]n interpreting a statute a court should always turn first to one, cardinal canon before all others.

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992) (citations omitted).

The plain language of the Rehabilitation Act and the ADA unambiguously provides that both statutes apply to all of the operations of every state government agency, department, and instrumentality. Specifically, section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity* receiving Federal financial assistance." 29 U.S.C.A. § 794(a) (emphasis added). The statute defines "program or activity" as "*all* of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government . . . any part of which is extended Federal financial assistance." *Id.* § 794(b)(1)(A) (emphasis added). A state correctional department such as the Maryland Department of Public Safety and Correctional Services ("MDPSCS") clearly constitutes a "department' or "agency" of a state, and a state prison such as the Roxbury Correctional Institution {"RCI") clearly falls within the "operations" of the MDPSCS. Section 504 clearly states that it applies to "any" such state entity, and thus the plain language of the statute does not suggest any exception for state prisons.

Title II of the ADA extends the prohibition against discrimination on the basis of disability to all services,

programs, and activities that a "public entity" provides, regardless of whether the entity receives federal financial assistance. Specifically, Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a *public entity*, or be subjected to discrimination by any such *entity*." 42 U.S.C.A. § 12132 (emphasis added). The statute defines "public entity" as "any State or local government" and "*any* department, agency, special purpose district, or other instrumentality of a State or States or local government." *Id.* § 12131(1)(A), (B) (emphasis added). Again, state correctional departments and state prisons clearly constitute departments or instrumentalities of a state, and Title II's broad language does not suggest any exception for state prisons.

In accordance with the plain language of the statutes, the vast majority of courts that have addressed the issue have held that section 504 of the Rehabilitation Act and Title II of the ADA do apply to state prisons. *See Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168, 170-174 (3d Cir. 1997) (holding that section 504 of the Rehabilitation Act and Title II of the ADA apply to state prisons); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 483-87 (7th Cir. 1997) (same); *Duffy v. Riveland*, 98 F.3d 447, 453-55 (9th Cir. 1996) (same); *Lue v. Moore*, 43 F.3d 1203, 1205 (8th Cir. 1994) (holding that section 504 of the Rehabilitation Act applies to state prisons); *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994) (same); *Harris v. Thigpen*, 941 F.2d 1495, 1522 n.41 (11th Cir. 1991) (same); *Bonner v. Lewis*, 857 F.2d 559, 561-62 (9th Cir. 1988) (same). Only one court of appeals has held that the Rehabilitation Act and the ADA do not apply to state prisons. *See White v. Colorado*, 82 F.3d 364, 367 (10th Cir. 1996) (holding that section 504 of the Rehabilitation Act and Title II of the ADA do not apply to employment discrimination claims

brought by state prison inmates).

Although the majority opinion in the instant case concedes that the statutory language is broad and inclusive and that the legislative histories of the Rehabilitation Act and the ADA do not forbid application to state prisons, it argues that the statutes do not apply to state prisons because the statutes do not clearly and explicitly state that they apply to state prisons. I agree with the majority that Congress must speak clearly in the statutory text when it intends to alter the traditional balance between the states and the federal government. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991). I also agree with the majority that the operation of state prisons is an area traditionally reserved to the states. *See Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973). However, the Supreme Court has made it plain that courts should apply the so-called "clear statement rule" as a canon of statutory construction only when the statutory text is ambiguous and furnishes little guidance as to whether Congress intended to subject state agencies to potential liability. *See Gregory*, 501 U.S. at 470 (describing the clear statement rule as "a rule of statutory construction to be applied where statutory intent is ambiguous"); *EEOC v. Wyoming*, 460 U.S. 226, 244 n.18 (1983) (holding that the clear statement rule is "a tool with which to divine the meaning of otherwise ambiguous statutory intent"). The Court has held that the clear statement rule simply does not apply when the statutory text is clear and "there is no doubt what the intent of Congress was." *EEOC*, 460 U.S. a 244 n.18. The clear statement rule simply is "not a warrant to disregard clearly expressed congressional intent." *Yeskey*, 118 F.3d at 173.

Congress made its intent unmistakably clear with regard to the Rehabilitation Act and the ADA. As noted above, the Rehabilitation Act specifically provides that it applies to "*all* of the operations of . . . a department, agency, special purpose

district, or other instrumentality of a State or of a local government," 29 U.S.C.A. § 794(b)(1)(A) (emphasis added), and the ADA explicitly states that it applies to "*any* department, agency, special purpose district, or other instrumentality of a State or States or local government," 42 U.S.C.A. § 12131(10(B) (emphasis added). State correctional departments and state prisons clearly constitute "department[s]" or "instrumentalit[ies]" of the state, and the statutes clearly ;provide that they apply to *all* such entities.

The majority suggests that Congress cannot make the Rehabilitation Act and the ADA applicable to state prisons or to other areas traditionally reserved to the states unless it separately lists each state agency that the statutes apply to in the statutory text. The Supreme Court, however, has expressly rejected such a requirement. *See Gregory*, 501 U.S. at 467 ("This does not mean the Act must mention judges explicitly."). Congress only needs to make the scope of a statute "plain." *Id.* Congress made the scope of the Rehabilitation Act and the ADA plain when it specifically provided that both statutes apply to state and local governments and "any" or "all" of their operations. As Judge Posner noted in *Crawford*, 115 F.3d at 485, "[w]e doubt . . . that Congress could speak much more clearly than it did when it made the [ADA] expressly applicable to all public entities and defined the term 'public entity' to include every possible agency of state or local government."**********

**********I also note that I am not persuaded by the majority's citation to *Virginia Dep't of Education v. Riley*, 106 F.3d 559, 567 (4th Cir. 1997) (*en banc*), in support of their argument that we should apply the clear statement rule in the instant case. In that case, we examined a provision of the Individuals with Disabilities Education Act (the "IDEA") that required states to have a policy in effect "that assures *all* children with disabilities that right to a free appropriate public education," 20 U.S.C.A. § 1412 (West supp. 1997) (emphasis added), in order to receive federal educational

Moreover, I do not agree with the majority that the Rehabilitation Act and the ADA exclude prisoners from coverage because the statutes only protect "qualified individual[s]" with a disability. The ADA defines that phrase as "an individual with a disability who, with or without reasonable modifications . . ., meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C.A. § 12131(2). The terms "eligibility" and "participation" do not, as the majority opinion argues, imply voluntariness and thus exclude prisoners who by definition are involuntary participants. To the contrary, "eligible" simply refers to those who are "fitted or qualified to be chosen," *see* Webster's Third New International Dictionary 736 (1993), without regard to the individual's choice.

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funds. Despite the broad and inclusive statutory language, a majority of the *en banc Riley* Court concluded that the provision was ambiguous, applied the clear statement rule, and held that the federal government may not require states to provide educational services to disabled children who are expelled for misconduct. As the majority opinion in the instant case notes, the *Riley* Court based its holding on its conclusion that not "a single word from the statute or from the legislative history of [the] IDEA evidence[s] that Congress even considered" requiring states to continue providing educational services to such children. *Riley* 106 F.3d at 567. Based on the clear statutory language of § 1412, however, I dissented *See id.* at 575 ("I have concluded that 'all' menas 'all.'").

Less than four months after we decided *Riley*, congress amended § 1412 of the IDEA. Section 1412 now provides tha tin order to receive federal educational funds, states must demonstrate that they havepolicies in effect that ensure that "[a] free appropriate public education is available to *all* children with disabilities residing in the State between the ages of 3 and 21, inclusive, *including children with disabilities who have been suspended or expelled from school.*" IDEA Amendments for 1997, Pub. L. No. 105-17, § 612, 111 Stat. 37, 60 (emphasis added). Congress specifically noted in the legislative history that the amendment was merely a "clarification[ ]," not a change, to § 1412. S. Rep. No. 105-17, at 11 (1997). Thus, the majority's reliance on *Riley* is questionable.

The fact that prisoners participate in prison activities involuntarily does not mean that they do not participate. Congress clearly intended the statutes to apply even in "involuntary" contexts. In its findings demonstrating hte need for the ADA, Congress expressly stated in the statutory text that "discrimination against individuals with disabilities persists in such critical areas as . . . *institutionalization*." 42 U.S.C.A. § 12101(a)(3) (West 1995) (emphasis added). *See also Yeskey*, 118 F.3d at 173 (rejecting the state's argument that the Rehabilitation Act and th eADA exclude coverage for prisoners because they are not "qualified individuals" and holding that "[t]he terms 'eligibility' and 'participation' do not . . . 'imply voluntariness' or mandate that an individual seek out or request a service to be covered"); *Bonner*, 857 F.2d at 563 (holding that a state prisoner was a "qualified individual" within the meaning of section 504 of the Rehabilitation Act even though his participation in prison activities was "sometimes required").

Indeed, the majority's suggestion that the Rehabilitation Act and the ADA do not apply to obligatory or mandatory programs and services leads to anomalous results. The "voluntary" limitation that the majority opinion imposes would immunize discrimination on the basis of disability in the provision of compulsory services such as public education, mandatory vaccinations, and jury service. Yet several courts including the Fourth Circuit, have indeed applied the statutes to such mandatory and "involuntary" programs. *See, e.g., DeVries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 880 (4th Cir. 1989) (applying section 504 of the Rehabilitation Act to public schools); *Galloway v. Superior Court of the District of Columbia*, 816 F. supp. 12, 15-19 (D.D.C. 1993) (holding that section 504 of the Rehabilitation Act and Title II of the ADA apply to jury service).

In holding that the Rehabilitation Act and the ADA apply

to state prisoners, Judge Posner noted:

> It might seem absurd to apply the Americans with Disabilities Act to prisoners. Prisoners are not a favored group in society; the propensity of some of them to sue at the drop of a hat is well known; prison systems are strapped for funds; the practical effect of granting disabled prisoners rights of access that might require costly modifications of prison facilities might be the curtailment of educational, recreational, and rehabilitative programs for prisoners, in which event everyone might be worse off. But . . . there is another side to the issue. The Americans with Disabilities Act was cast in terms not of subsidizing an inst group but of eliminating a form of discrimination that Congress considered unfair and even odious. The Act assimilates the disabled to groups that by reason of sex, age, race, religion, nationality, or ethnic origin are believed to be victims of discrimination. Rights against discrimination are among the few rights that prisoners do not park at the prison gates. Although the special conditions of the prison setting license a degree of discrimination that would not be tolerated in a free environment, there is no general right of prison officials to discriminate against prisoners on grounds of race, sex, religion, and so forth. If a prison may not exclude blacks from the prison dining hall and force them to eat in their cells, and if Congress thinks that discriminating against a blind person is like discriminating against a black person, it is not obvious that the prison may exclude the blind person from the dining

hall.

Crawford, 115 F.3d at 486 (citations omitted). I agree. Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1). *See Alexander v. Choate*, 469 U.S. 287, 295-97 (1985) (discussing the broad nondiscrimination goals of the Rehabilitation Act). Applying the Rehabilitation Act and the ADA to state prisons, pursuant to the clear and unambiguous statutory text, furthers the broad remedial goals that underlie both statutes.

In sum, the plain language of the Rehabilitation Act and the ADA and the remedial purposes underlying both statutes clearly demonstrate that the statutes apply to state prisons. The district court therefore erred when it granted summary judgment to the Appellees on those claims on the ground that the statutes do not apply to state prisons.

B.

The district court also relied on our actual holding in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996), and granted summary judgment to the Appellees on the alternative ground that even if the Rehabilitation Act and the ADA do apply to state prisons, qualified immunity would bar the Appellants' claims for monetary damages under the two statutes. In *Torcasio*, a state prisoner sued prison officials in their personal capacity pursuant to section 504 of the Rehabilitation Act and Title II of the ADA. We held that qualified immunity barred the prisoner's claims because it was not clearly established at the time of the alleged violations that the ADA and the Rehabilitation Act applied to state prisons. *See id.* at 1343-52.

Qualified immunity bars suits against state officials in their *personal* capacity. Courts developed the doctrine to alleviate the risk that officials' fear of personal liability might unduly inhibit them in the discharge of their duties. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Thus, when a plaintiff sues state officials in their personal capacity, qualified immunity protects the officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Id.* at 638.

Unlike the plaintiff in *Torcasio*, however, the Appellants in the instant case sued two state governmental entities (the MDPSCS and RCI) and two state officials (Richard Lanham and John Galley) in their *official*, representative capacities only. Sovereign immunity, rather than qualified immunity, bars suits in federal courts against state entities and state officials in their official capacity without the state's consent. *See Seminole Tribe of Fla. v. Florida*, 116 S. Ct. 1114, 1122 (1996); *Adden v. Middlebrooks*, 688 F.2d 1147, 1153-54 (7th Cir. 1982) (holding that sovereign immunity barred a wrongful death suit against a state correctional department in federal court); *Jones v. Smith*, 784 F.2d 149, 152 (2d Cir. 1986) (holding that sovereign immunity barred a § 1983 suit for monetary damages against a prison official in his official capacity).

The Supreme Court has held, however, that Congress may abrogate the states' sovereign immunity if it unequivocally expresses its intent to abrogate the immunity and has acted pursuant to a valid exercise of power, such as section 5 of the Fourteenth Amendment. *See Seminole Tribe of Fla.*, 116 S. Ct. at 1125. Congress clearly expressed its intent to abrogate the states' sovereign immunity under the Rehabilitation Act and the ADA. *See* 42 U.S.C.A. § 2000d-7(a)(1) (West 1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for

a violation of section 504 of the Rehabilitation Act of 1973."); 42 U.S.C.A. § 12202 (West 1995) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA.]"). Moreover, Congress passed section 504 of the Rehabilitation Act and Title II of the ADA pursuant to its powers under section 5 of the Fourteenth Amendment. *See Welch v. Texas Dep't of Highways and Public Transp.*, 483 U.S. 468, 472 n.2 (1987); 42 U.S.C.A. § 12101(b)(4).

Thus, sovereign immunity, rather than qualified immunity, potentially barred the Appellants' claims in the instant case. However, Congress clearly abrogated the states' sovereign immunity under the Rehabilitation Act and the ADA and thus clearly authorized damage claims against state entities and state officials sued in their official capacity. The district court therefore erred when it granted summary judgment to the Appellees on the Rehabilitation Act and ADA claims on the alternative ground that qualified immunity barred the Appellants' claim for damages under the two statutes.

II.

Accordingly, I would reverse the district court's grant of summary judgment to the Appellees on the Rehabilitation Act and ADA claims. I would hold that the Rehabilitation Act and the ADA apply to state prisons and that qualified immunity does not bar the Appellants' claims. Since the district court only addressed the threshold questions of the applicability of the statutes and the Appellees' qualified immunity defense, I would remad for the district court to address the merits of the Apellants' statutory claims in the first instance. I dissent.

Supreme Court, U.S.
FILED
FEB 5 1998
CLERK

No. 97-1113

In the

Supreme Court of the United States

October Term, 1997

GRANVILLE AMOS, *et al.*,
Petitioners,

v.

MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Congress make unmistakably clear in § 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act an intent to alter the constitutional balance so that these federal acts apply to the core state function of operating state prisons?

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioners, thirteen disabled inmates at the Roxbury Correctional Institution ("RCI") in Hagerstown, Maryland, filed this action against the Maryland Department of Public Safety and Correctional Services, RCI, Division of Correction Commissioner Richard Lanham, and RCI Warden Jon P. Galley, seeking injunctive relief and damages under § 504 of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394 (codified at 29 U.S.C. § 794 *et seq.*)(the "Rehabilitation Act") and Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131 to 12165. The plaintiffs alleged that RCI was not handicap-accessible in a number of respects,

thereby limiting their ability to participate in various prison programs and to access or use certain prison facilities. In addition, the prisoners alleged that they were denied needed medical care in violation of the Eighth Amendment.

On January 26, 1996, the district court granted the State's motion for summary judgment on the claims for injunctive relief in light of the Fourth Circuit's decision in *Torcasio v. Murray*, 57 F.3d 1340 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 772 (1996), which granted state prison officials qualified immunity from ADA and Rehabilitation Act claims, and strongly intimated that those statutes do not apply to the operation of state prisons. The district court also subsequently dismissed the medical claims.

On appeal, the Fourth Circuit affirmed, reasoning that the operation of state prisons could not "be subjected to the ADA and the Rehabilitation Act unless there has been a clear and plain statement from Congress permitting federal intrusion into this area of historic state control" and "that Congress has made no such clear statement regarding the application of the ADA and the Rehabilitation Act to state prisons." *Amos v. Md. Dept. of Public Safety & Corr. Services*, 126 F.3d 589, 600-601 (4th Cir. 1997). The Fourth Circuit's decision accorded with the Tenth Circuit's decision in *White v. Colorado*, 82 F.3d 364 (10th Cir.1996) (holding that the ADA and Rehabilitation Act do not apply to state prisons), but was at odds with decisions from the Third and Seventh Circuits, *see Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir.1997), *cert. granted*, ___ U.S. ___ (1998)(holding that the ADA and Rehabilitation Act apply to state prisons); *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir.1997)(same). The Ninth Circuit subsequently followed the Third and Seventh Circuits in holding that the ADA and Rehabilitation Act apply to state prisons. *Armstrong v. Wilson*, 124 F.3d 1019 (9th Cir. 1997).

REASONS FOR DENYING THE WRIT

THE FOURTH CIRCUIT CORRECTLY DECIDED THE CENTRAL ISSUES IN THIS CASE BY ADHERING TO THIS COURT'S PRECEDENTS

The Court should deny the petition for writ of certiorari because the Fourth Circuit correctly decided this issue, in a thorough and meticulously reasoned opinion. Reviewing and reaffirming its strong *dicta* from *Torcasio*, the court of appeals held that "Congress must make its intention to alter the constitutional balance between the States and the Federal Government unmistakably clear" in its statutory language. *Amos*, 126 F.3d at 594. Management of state prisons, the court reasoned, is an area traditionally reserved to the states, and "Congress failed to speak with unmistakable clarity on the issue of whether the Rehabilitation Act and the ADA apply to state prisons." *Amos*, 126 F.3d at 595-596. The court considered and rejected contentions that the operations of state or local correctional facilities are the types of "programs" or "activities" contemplated by the statutory language of the ADA and Rehabilitation Act. *Amos*, 126 F.3d at 601.

Although this Court has recently granted certiorari in *Yeskey v. Pennsylvania Dep't of Corrections*, 118 F.3d 168 (3d Cir.1997), to decide the applicability of the ADA and Rehabilitation Act to state prisons, it would be proper to deny certiorari in this case because the Fourth Circuit's decision persuasively and faithfully followed this Court's "clear statement" precedents.[1]

The appeals court, reaffirming its *Torcasio* rationale, looked to the well-established rule of statutory construction

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[1] In the alternative, this Court should hold the petition in abeyance pending decision in *Yeskey*.

that, to alter the constitutional balance between the States and the Federal Government, Congress must make that intent unmistakably clear in the statute's language. *Amos*, 126 F.3d at 595. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). The requirement that Congress leave no doubt about its intent, the Fourth Circuit noted, has unique force "'[i]n traditionally sensitive areas, such as legislation affecting the federal balance'" to ensure that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Amos*, 126 F.3d at 604, quoting *United States v. Bass*, 404 U.S. 336, 349 (1971). *See also Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Turning to a different line of this Court's cases, the Fourth Circuit observed that the management of state prisons is, beyond dispute, a core state function. *Amos*, 126 F.3d at 595 (citing *Procunier v. Martinez*, 416 U.S. 396, 412 (1974) (holding that "[o]ne of the primary functions of government is the preservation of societal order through enforcement of the criminal law, and the maintenance of penal institutions is an essential part of that task"), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 413-14 (1989)); *Preiser v. Rodriguez*, 411 U.S. 475, 491-92 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons."); *see also Turner v. Safley*, 482 U.S. 78, 84-85 (1987); *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981); *Bell v. Wolfish*, 441 U.S. 520, 562 (1979); *Lewis v. Casey*, 116 S. Ct. 2174, 2197 (1996)(Thomas, J., concurring)(stating that the federal judiciary has no authority "to take control of core state institutions like prisons, schools, and hospitals, and assume the responsibility for making the difficult policy judgments

that state officials are both constitutionally entitled and uniquely qualified to make.")

The high degree of deference to state prerogatives in prison management, the appeals court reasoned, "'is in significant measure motivated by the realization that principles of comity and federalism apply with special force in the context of correctional facilities.'" *Amos*, 126 F.3d at 596 (quoting *Torcasio*, 57 F.3d at 1346 (citing *Procunier*, 416 U.S. at 405) ("where state penal institutions are involved, federal courts have ... reason for deference to the appropriate prison authorities") and *Preiser*, 411 U.S. at 492, (the "internal problems of state prisons involve issues [that are] peculiarly within state authority and expertise")).

Scrutinizing the language of the ADA and Rehabilitation Act, the appeals court properly determined that this Court's "closely analogous" decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), controlled. In *Gregory*, this Court held that the Age Discrimination in Employment Act (ADEA), despite its express abrogation of the States' Eleventh Amendment immunity, see 29 U.S.C.A. § 630(b)(2) (West 1985), did not apply to state judges because the statute did not unmistakably state its intent to intrude on the core function of state court judicial management.

Similarly, although the ADA and the Rehabilitation Act expressly abrogated Eleventh Amendment immunity, *see* 42 U.S.C.A. § 2000d-7(a)(1); 42 U.S.C.A. § 12202, those acts did not address an intent to intrude into the core state function of state prison management. Just as this Court found that the ADEA did not clearly apply to state judges, *see Gregory*, 501 U.S. at 467 (statute "is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges"), here the broad coverage of state "programs" and "activities" leaves considerable doubt about Congress's intent to micromanage state prisons. Accordingly, the Fourth Circuit was absolutely correct in "declin[ing] to attribute to Congress an intent to intrude on a core state function in the face of statutory ambiguity."

Amos, 126 F.3d at 605.

CONCLUSION

For the reasons stated, the petition should be denied.

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